

No. 118

Consolidated with Nos. 117, 119, 332, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1953

UNION PACIFIC RAILROAD COMPANY; CHICAGO AND
NORTH WESTERN RAILWAY COMPANY; CHICAGO, ST. PAUL,
MINNEAPOLIS & OMAHA RAILWAY COMPANY; NORTHERN
PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY
COMPANY; THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY; WABASH RAILROAD COMPANY,

Appellants,

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF FOR ABOVE NAMED APPELLANTS

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Upon the Admission by the Rio Grande's President and Other Evidence that the Sole Objective of the Proceeding is to Increase its Revenues and Improve its Financial Condition by Diverting Traffic and Revenues from the Union Pacific and Other Railroads, the Commission Acted Arbitrarily and Contrary to Law in Overruling the Motion to Dismiss the Complaint on the Ground that Section 15(4) of the Act Prohibits the Commission from Compelling Through Routes and Joint Rates for that Purpose, and the District Court Erred in Refusing to Annul the Order on that Ground.....

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Appendix B—Pertinent provisions of the Interstate Commerce
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OPINIONS BELOW

The majority opinion and the dissenting opinion of the three-judge United States District Court for the District of Nebraska (R. 151) are reported in 132 F. Supp. 72. The report of the Interstate Commerce Commission (R. 25) appears in 287 I. C. C. 611.

JURISDICTION

This action was brought June 25, 1953 (R. 3), by the above-named railroads pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul and set aside the order issued January 12, 1953, by the Interstate Commerce Commission in a proceeding entitled "Docket

30297, *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co., et al.*" Petitions for reconsideration were denied by the Commission on June 10, 1953 (V. H, 1778).*

Final judgment and decree of the majority of the district court sustaining the validity of the order "in part" and enjoining it "in part" was entered December 20, 1954 (R. 210). Notice of appeal¹ was filed February 18, 1955 (R. 230). On March 22, 1955, Circuit Judge Johnsen, presiding member of the district court, entered an order extending to June 1, 1955, the time for filing the record and docketing the cases of all appellants in this Court. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted on October 24, 1955.

STATUTE INVOLVED

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out verbatim in Appendix B hereto:

National Transportation Policy (preceding Section 1), and Sections 1(3)(a), 1(4), 1(5), 3(1), 3(4), 15(1), 15(3) and 15(4).

QUESTIONS PRESENTED

The Commission's order in this case was issued upon a complaint filed by The Denver and Rio Grande Western Railroad Company (herein called "Rio Grande"). The Rio Grande has been a chronically bank-

1 Jointly with Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska; and Nebraska State Railway Commission, who are filing a brief for those States.

* Because of duplication in page numbering of part of the record, this abbreviation will be used to designate pages of the record in Vols. I and II, proceedings before the Commission.

rupt and a "financial needs" railroad throughout its existence, and its President testified that the sole purpose of the complaint was to improve the Rio Grande's financial condition. The order requires the Union Pacific and over 200 other railroads to establish and maintain through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained over their transcontinental routes (herein called "Union Pacific routes") on traffic² originated and terminated at points on Union Pacific routes and hauled under joint rates maintained over those routes through Wyoming, Nebraska and Kansas for 7½ years between points in the northwest area, embracing Utah north of Ogden, Idaho, Oregon, Washington and Montana, and points in the eastern and southern parts of the United States generally east and south of the Missouri River.³ The joint rates do not apply via the Rio Grande and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via that line.

The commodities named in the order comprise about 57,000 carloads of traffic annually or about one-third of the total traffic the Rio Grande seeks to divert to its line. Diversion of the traffic to the Rio Grande would short haul Union Pacific routes 925 miles, leaving those routes hauls as short as 100 to 400 miles on most of the traffic, in lieu of their present hauls of 1,000 to more than 2,000 miles.

2 Carloads of granite and marble monuments from origins in Vermont and Georgia to destinations in the northwest area embracing Utah north of Ogden, Idaho, Oregon, Washington and Montana, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from origins in the northwest area to destinations in the eastern and southeastern parts of the United States.

3 The lines and termini of the Union Pacific and the Rio Grande (main lines) and other data are indicated on the map attached as Appendix A hereto.

Section 15(4) of the Act prohibits the Commission from ordering additional routes that would short haul existing routes, except under the conditions therein specified. Such additional routes ordinarily are sought not, as in this case, by a railroad seeking to improve its financial position, but by shippers seeking better transportation service. The ordering of such additional routes is justified only when the existing routes are unreasonably long or fail to render adequate, efficient or economic service, and when the *proposed* additional routes are shorter and are needed to provide "adequate and more efficient or more economic" service than that provided by existing routes.⁴

The physical, geographic and transportation conditions in the instant case are exactly the reverse of those upon which the Commission is justified in ordering an additional route that short hauls existing routes.

⁴ See *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588; and *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, in which the Commission said at pages 333-334:

"Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short haul one or more carriers have been prescribed. See *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333 (sustained in *Pennsylvania R. Co. v. United States*, 323 U. S. 588); *Allied Mills, Inc., of Virginia v. Alton R. Co.*, 272 I. C. C. 49; *California Milling Corp. v. Atchison, T. & S. F. Ry. Co.*, 269 I. C. C. 72 and 374 I. C. C. 120. In the first two of those proceedings it appeared that the routes required to be established eliminated expensive out-of-line hauls, and in the latter proceeding the routes required were shown to be shorter in many instances than those which had existed. In all of those proceedings the routes required were at least as economical, from the standpoint of the carriers as well as of the shippers, as were most of the existing routes.

"The instant situation differs. All of the routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation. In addition, because of the circumstances here present, we believe a requirement that the routes sought be established would not 'give reasonable preference' to the originating carrier."

The Commission found that existing Union Pacific routes are shorter and faster than the Rio Grande; are efficiently operated; have surplus transportation capacity; furnish service "as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande" (R. 70), and are adequate to move over their "direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (R. 62).

On the other hand, the Commission found that the Rio Grande has no trackage in the northwest and proposes to render no service in that area; that routes via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific and would range from 33% to more than 50% longer than many of the Union Pacific routes; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers than is now required in movement of the traffic over Union Pacific routes. The Commission further found that the Rio Grande route is "less favorably situated than that of the Union Pacific"; that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (R. 62, 70), and that dissimilarities in transportation and operating conditions are so substantial and unfavorable to the Rio Grande as to prevent a finding of discrimination against the Rio Grande resulting from refusal of lines comprising Union Pacific routes to make their joint rates on the involved traffic applicable via the Rio Grande.

Notwithstanding those findings, the Commission concluded that through routes in connection with the longer,

slower and "more onerous" Rio Grande line, and joint rates "the same" as the rates maintained over Union Pacific routes were "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for the commodities named in its order (R. 73).

The Commission found that through service over Union Pacific routes, in general, "is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City," but that the testimony of shippers "does raise a question" as to a need for "more adequate and economic" service than is afforded by existing routes with respect to some commodities (R. 70, 69). It asserted that shippers of perishable food articles in the northwest area "are debarred from effective participation in the widespread system developed for the marketing of such commodities" (apparently, only, because they must pay higher rates if they ship over the Rio Grande to markets in the eastern and southern parts of the country), and that for perishable articles "reconsigned or accorded transit privileges" *at points on the Rio Grande*, "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that, therefore, Union Pacific routes are "inadequate and less economical than are the Rio Grande routes" (R. 70). In other words, the Commission condemned Union Pacific routes as "inadequate" because they do not serve points located exclusively on the Rio Grande, and because higher rates apply via the Rio Grande.

The district court (Circuit Judge Johnsen dissenting on the ground that the order was void and should be enjoined in its entirety because the Commission used

standards and criteria that were beyond warrant of the Act) held that the order is valid only to the extent that it embraces shipments of the articles named therein stopped for processing, milling, grazing cattle in transit and other "commercial operations" known as "transit privileges", at points on the Rio Grande and later re-shipment to destinations beyond its termini.

The majority of the court, however, though correctly holding that the evidence does not support the Commission's finding that service over Union Pacific routes is inadequate or less economical than that of Rio Grande routes, proceeded to make its own finding that transportation service for the involved traffic over the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" and that, therefore, the through routes and joint rates ordered by the Commission are justified for shipments stopped for in-transit privileges at points on the Rio Grande and later reshipment to points beyond its termini. For those shipments the court held that the order "is valid under Secs. 1, 15(3) and 15(4) of the Act" and "for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act" at points along the Bamberger Railroad between Ogden and Salt Lake City (R. 167, 168).

For shipments *not* stopped for in-transit privileges on the Rio Grande, the court held the order invalid.

The following questions are presented by this appeal.⁵

5 The plurality of questions presented and the length of this brief are results of the Rio Grande's commingling in its complaint of separate and independent provisions of the Act concerning its rights as a carrier, the rights of shippers, and the "public interest"; also from

I. Whether the court below erred in refusing to hold that, in this proceeding, brought by the Rio Grande for the admitted purpose of enhancing its financial position by diverting for a "bridge" haul over its line trans-continental through traffic now and for some 75 years moved over Union Pacific routes between points on those routes in the northwest and points in the eastern and southern parts of the United States, the Commission was prohibited from issuing the order by the provision of Section 15(4) of the Interstate Commerce Act that, "[n]o through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs", and that this prohibition may not be evaded or circumvented by the Commission's assertion that in making the order "no consideration has been given to the financial needs" of the Rio Grande.

II. Whether the court erred in refusing to hold that, in view of the short haul prohibition of Section 15(4) of the Act (49 U. S. C., § 15(4)), the Commission acted arbitrarily and unlawfully in issuing the order short-hauling Union Pacific routes at least 925 miles, upon the Commission's own findings of fact:

- (a) That Union Pacific routes have lower rates than the Rio Grande and are shorter, faster, efficiently operated, adequate and have surplus capacity to haul any foreseeable volume of the through traffic involved;

(Continued from preceding page)

what Circuit Judge Johnsen's dissenting opinion aptly describes as "all the confusion in which the [Commission's] report is wrapped," "the loose and improper basis and manner in which * * * the Commission has dealt with the entire situation," and from the further confusion and apparent misconception of the majority of the district court concerning its judicial functions in reviewing the order.

- (b) That movement of the same through traffic via the Rio Grande would require from 200 miles to as much as 50% more transportation, at least 24 hours more time in transit, and one or two additional interchange services; and that the Rio Grande maintains higher rates, is less favorably located and has "more onerous" operating conditions than the Union Pacific or any of the other western lines.

III. Whether the court erred in failing to hold that the entire order is void because the Commission misconstrued, departed from and failed to observe and make the findings required by the controlling statutory standards and criteria of Sections 1(4), 3(1) and (4) and 15(3) and (4)(b), in basing its order:

(a) Upon the premise that the standards and conditions of Section 15(4)(b) [which permit establishment of a proposed route short-hauling existing routes of other railroads; *only* if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation"] are lawfully observed and applied by the Commission's findings here:

1. of a need for "more" adequate and economic service than that afforded by Union Pacific routes and
2. that the Rio Grande route is "necessary and desirable" to provide "adequate and more economic transportation",

without any finding by the Commission that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes for the involved through traffic between the same origins and the same ultimate destinations;

- (b) Upon the premise that the conditions which permit short-hauling Union Pacific routes under Section 15(4)(b) can be met and satisfied by merely substituting the lower joint rates applicable over the Union Pacific routes for the higher combination rates via the proposed Rio Grande route;
- (c) Upon the premise that, under Section 15(4)(b), Union Pacific routes may lawfully be condemned and found "inadequate and less economical" than the Rio Grande route for through traffic because *at points located on and served only by the Rio Grande*, "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply";
- (d) Upon the premise that the Commission may invoke its power under Section 15(3) and (4)(b) for the purpose of making additional transit privileges available by equalizing rates via the Rio Grande with rates applicable over Union Pacific routes;
- (e) Upon the criteria that the marketing system for food articles of a perishable nature requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible", although Section 1(4) requires carriers to establish only "reasonable" through routes;
- (f) Upon the inconsistent criteria that:
 1. food articles of a perishable nature must move to markets "with expedition and care" and "without unnecessary interruptions";
 2. the longer Rio Grande route is necessary to permit the through transportation of such articles to be interrupted so that the articles may be held as long as 12 months at points on the Rio Grande for "commercial operations" called transit privileges, and

3. ordinary livestock to stop for grazing or feeding, and marble and granite monuments to stop for partial unloading at points on the Rio Grande fall within the category of perishable food articles found by the Commission to require expeditious, careful and uninterrupted transportation;

(g) Upon the premise that the Commission may lawfully invoke its powers under Section 15(3) and (4) to obtain the remedy it desires for rates found violative of Sections 1 and 3, and that findings of violations of the latter sections afford a lawful basis for ordering the through routes and joint rates.

IV. Whether the court erred in holding that the Commission may require Union Pacific routes to short haul themselves by establishing through routes and joint rates with the Rio Grande for the sole purpose of permitting through traffic to be stopped at points on the Rio Grande, not served by the Union Pacific, for "commercial operations" (known as "transit" privileges), such as storing, processing and cattle grazing, at the same rates the same shippers have when using Union Pacific routes between the same points of origin and the same ultimate destinations.

V. Whether the lower court's finding that transportation service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" for through shipments requiring transit at points on the Rio Grande and reshipment to final destinations beyond its termini, affords a lawful basis for the order short-hauling Union Pacific routes under Section 15(4)(b), which permits short-hauling other railroads only if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

VI. Whether the court erred in failing to review and consider the whole record of evidence and all of the issues tendered by the pleadings and arguments of the parties, and in failing to hold that the order is entirely null and void, because:

- (a) The order is based upon erroneous interpretations of law, and there is no rational basis or support for the order or any part of it, in the evidence or in the findings made by the Commission;
- (b) The Commission *did not make*, and the evidence does not justify or support findings essential to the validity of the order, among others:
 1. that Union Pacific routes are inadequate, inefficient and uneconomic for movement of the involved traffic,
 2. that the Rio Grande route is "needed" for the involved traffic, and that it will provide "more efficient" transportation service than Union Pacific routes,
 3. that diverting traffic and revenues from Union Pacific routes to the Rio Grande would serve such beneficial purpose as maintaining good service or improving it,
 4. that the Rio Grande is efficiently operated, furnishes satisfactory service or has surplus capacity or ability to haul any additional volume of traffic,
 5. that diverting the traffic to the Rio Grande's longer route will speed up its movement,
 6. that the Rio Grande will generate new or additional traffic or contribute additional transportation facilities in the northwest area, or that existing routes are insufficient or incapable of moving the traffic to and from that area,

7. that by including the Rio Grande in the through routes shippers to and from the northwest area will have lower rates than they have via the Union Pacific routes,
 8. that the overall transportation system or shippers using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line,
 9. that shippers have ever made complaint against service rendered by Union Pacific routes for the traffic involved, or demanded that the Rio Grande be included in present through routes;
- (c) The evidence does not support or justify the Commission's findings—
1. that the combination of local rates via the Rio Grande are unjust and unreasonable,
 2. that the joint rates which now apply over Union Pacific's shorter and more direct routes are reasonable for application via the longer and more onerous Rio Grande route,
 3. that the combination rates via the Rio Grande are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande route and unduly preferential of shippers and receivers using the Union Pacific routes,
 4. that the Union Pacific and other railroads discriminate against the Rio Grande in violation of Section 3(4) in maintaining joint rates with the Bamberger Railroad at points on its line between Ogden and Salt Lake City, while refusing to make like joint rates with the Rio Grande at the same points,
 5. that through routes and joint rates with the Rio Grande are "necessary and desirable" in the public interest to provide "adequate and more economic transportation",

6. that shippers in the northwest producing area (who testified that they sell their products in all markets in all the 48 states and 5 foreign countries) "are debarred from effective participation" in the marketing system because they must pay higher rates if they ship through traffic via the Rio Grande than the joint rates available to them via Union Pacific routes for the same through traffic moving between the same origins and the same destinations;
- (d) The Commission arbitrarily refused to give effect to the requirement in Section 15(4) that reasonable preference be given the originating carriers;
- (e) The Commission refused to consider or give effect to the National Transportation Policy and to the evidence showing that diversion to the Rio Grande of any substantial part of the traffic would result in wasteful transportation and economic waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees and would inflict serious economic injury to numerous communities and the public served by Union Pacific routes;
- (f) The Commission arbitrarily commingled and misused its authority under, and the remedies for violations of the separate and independent provisions of Sections 1(4), 3(1) and (4) and Section 15(3) and (4), and its order is vague, uncertain, indefinite and conflicting in its requirements;
- (g) Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and in ordering through routes and joint rates on the theory that because shippers had intervened and testified, the Rio Grande's complaint became a shipper complaint;

- (h) The Commission acted arbitrarily and unlawfully in refusing to dismiss the entire proceeding on the ground that it was vitiated and nullified by the fact that shipper witnesses on whose testimony the order is based were admittedly solicited and procured by the Rio Grande to testify in such manner as to help it win its case.

STATEMENT

The Rio Grande operates a short-line railroad with its eastern termini at Denver, Pueblo and Trinidad, Colorado, and its western terminus at Ogden, Utah, the distance between Denver and Ogden being 607 miles via its main line, and 782 miles via Pueblo. Its history has been essentially one of financial difficulty and of bankruptcy. It has been a "financial needs" railroad throughout most of its existence.⁶ Its mountainous location and tortuous physical features have resulted in "operating conditions on the Rio Grande" that are "more onerous than those on the lines of the Union Pacific" or any other transcontinental railroad (R. 70), and caused the Commission in prior cases to grant the Rio Grande's demands for higher rates, based on its "financial necessities", than rates prescribed for other western railroads.⁷

Constructed in 1870 as a narrow-gage line and converted to standard gage in 1890, the "Rio Grande was built for the purpose of handling the local business tributary to its line"⁸ but its management soon determined

- 6 *Denver & Rio Grande Investigation*, 113 I. C. C. 75; *Reconstruction Finance Corp. v. Denver & R. G. W. R. Co.*, 328 U. S. 495.
- 7 *Commercial Club, Salt Lake City v. A., T. & S. F. Ry. Co.*, 19 I. C. C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486; *Livestock Western District Rates*, 176 I. C. C. 1, 98 and 190 I. C. C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co.*, 218 I. C. C. 663.
- 8 *Commercial Club, Salt Lake City v. A., T. & S. F. Ry.*, *supra*, p. 221.

to enhance its financial position by diverting traffic from other lines for a "bridge" haul over its line, including transcontinental Pacific Coast traffic moving over the Union Pacific-Central (now Southern) Pacific route, construction of which had been completed from Council Bluffs, Iowa, through Ogden, Utah, to Oakland, California, in 1889.

Concentrating on its purpose to enhance its financial position by diverting traffic and revenues from other railroads, the Rio Grande's revenues from "bridge" traffic increased over 326 per cent in the 15-year period ending with 1948, while traffic originated and terminated on its line increased only 155 per cent and its local traffic originating and terminating at points on its line was less annually throughout that period than during the period 1924-1929.

Further pursuing its "bridge" traffic policy, the Rio Grande filed its complaint with the Commission in this case on August 1, 1949. Although the complaint alleged violations of Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act, the Rio Grande's President testified that the complaint was filed for the purpose of

9 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates on Union Pacific routes. Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

improving and enhancing its financial position by diverting for a "bridge" haul over its line so much as it can of about 172,000 carloads annually of transcontinental freight traffic now and for some 75 years moved under joint transcontinental rates¹⁰ over through routes which include lines of the Southern Pacific, Great Northern, Union Pacific, Northern Pacific and Milwaukee railroads (designated herein as "Union Pacific Routes") between points in the northwestern States of Oregon, Washington, Montana, Idaho and Utah, north of Ogden (designated in this brief as "northwest area"), and points in the eastern and southern parts of the United States, generally east of the Missouri and Mississippi rivers, including points on the Atlantic and the Gulf coasts.¹¹ These joint rates do not apply via the Rio Grande (except in certain instances not relevant here) and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via the Rio Grande.

The Rio Grande demanded before the Commission that its line be included as a "bridge line" in all of the multitude of through routes of Union Pacific and other railroads to and from the northwest area over which the

10 "Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions." (R. 28.)

11 The Commission found that the traffic the Rio Grande seeks to divert to its line in this case ordinarily moves over the Union Pacific through Wyoming and Nebraska to and from Missouri River gateways rather than over the Rio Grande, "because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande" for that traffic. (R. 37.)

joint rates are applicable, despite the fact it has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific and would range from 33 per cent to more than 50 per cent longer than Union Pacific routes; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.

Consistent with the protection afforded by Section 15(4) of the Act against short-hauling, and having their own direct and shorter routes, the Union Pacific and other roads serving the northwest area have always insisted, with immaterial exceptions, upon retaining their long hauls on traffic to and from that area.¹²

No complaint has ever been filed by shippers or the public or any state public service commission demanding the longer through routes and joint rates sought by the Rio Grande.

After lengthy hearings, a proposed report of its examiner recommending the granting of the Rio Grande's full demands, exceptions to that report, two oral arguments before the full Commission, it issued the subject

12 Union Pacific and some of the other railroad appellants have served the northwest for more than 75 years. Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands and the effect of the order is that, all these main and branchlines serve as "feeders" of bridge traffic to its line.

order January 12, 1953. Petitions for reconsideration were denied June 10, 1953.

The order (R. 21) requires the Union Pacific and numerous other railroads, whose connecting lines form through routes extending from the Pacific to the Atlantic and Gulf coasts, to establish through routes with the Rio Grande and "the same" joint rates maintained on Union Pacific routes on westbound carloads of granite and marble monuments from Vermont and Georgia to points in the northwest area and on eastbound carloads of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from points in the northwest area to points in the eastern and southern parts of the country, indicated above. These articles comprise about 57,000 carloads annually, or a third of the total volume of the traffic the Rio Grande seeks to divert to its line. Diversion of the traffic permitted by the order would short haul Union Pacific routes at least 975 miles, leaving them hauls as short as 100 to 400 miles on most of the traffic in lieu of their present hauls of 1000 to more than 2000 miles, resulting in a potential estimated revenue loss to the Union Pacific alone of more than \$11,000,000 annually, and, in very large losses to others of the railroad appellants.

The Commission's Findings and Conclusions

The Commission made the following findings, among others, which are essential to consideration of the questions presented. The findings are described here rather fully because of the obvious inconsistency between them and the Commission's ultimate conclusions and its order:

1. That it must overrule a motion of the defendant railroads to dismiss the complaint on the ground that the Commission was estopped by the "financial needs"

prohibition of Section 15(4) of the Act from issuing the order demanded by the Rio Grande. The Commission stated, that, in reaching its conclusions, "no consideration has been given to the financial needs" of the Rio Grande (R. 34);

2. That there are at present no through routes, as that term is used in the Act, over the Rio Grande on the traffic here concerned (except on eastbound sheep and goats), and that, any order requiring such routes and joint rates must be grounded upon findings as specified in Section 15(4)(b) of the Act, that the routes sought are "necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation" (R. 33);

3. That the proposed new route via the Rio Grande could not be required "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation" (R. 69);

4. That the Union Pacific has surplus transportation capacity, is efficiently operated, furnishes good service to shippers over its line, its "facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (R. 62), and that "through service" over Union Pacific routes is "as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande" (R. 70), except with respect to perishable food articles;

5. A large number of shippers and representatives of communities served by the Union Pacific, traffic, commercial and civic associations, opposed the Rio Grande's complaint. These were from localities in Washington,

Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah and Colorado (R. 65);

6. Shippers in opposition to the Rio Grande's complaint testified to the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. They testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event (R. 65);

7. That the Rio Grande route is from 33 to 219 miles longer than the Union Pacific (R. 40), and that routes via the Rio Grande would be from 33 to 50% longer than many of the present Union Pacific routes (R. 71);

8. That evidence as to the physical characteristics of the two lines shows that the Rio Grande is less favorably situated than the line of the Union Pacific; that traffic routed over the Rio Grande, as a "bridge" line would require at least 24 hours more time in transit than when routed over the Union Pacific and would require one or two more terminal interchange services (R. 62), and that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (R. 70);

9. That diversion of the traffic over the Rio Grande would deprive the Union Pacific of its long haul and would short haul it at least 925 miles in each instance (R. 41);

10. That the traffic sought by the Rio Grande moves over Union Pacific routes through Wyoming because those

routes are shorter and they offer lower rates than the Rio Grande (R. 37);

11. Concerning public need for the proposed Rio Grande route and damage to Union Pacific routes by diversion of traffic from them to the Rio Grande, the Commission found that it was impossible to determine or estimate accurately what volume of traffic might be diverted to the Rio Grande if all of the joint rates were made applicable over its line (R. 66), but that whatever the volume so diverted would be the result of "active solicitation" by the Rio Grande "to persuade" shippers and receivers to use its line as an overhead or "bridge" route, the value of its service to shippers, and the extent to which the Rio Grande can "induce" shippers to route traffic via its line for the purpose of using transit facilities at points on its line and subsequent reshipment beyond at the balance of joint through rates from the point of origin (R. 46);

12. That there are substantial/dissimilarities or differences between transportation conditions, operating conditions and lengths of hauls over Union Pacific routes and over the Rio Grande but that the differences in transportation conditions become "relatively insignificant" and "substantially similar" when "spread" over the longer hauls between the northwest area and the eastern and southern parts of the country (R. 72);

13. That the evidence failed to prove that the Union Pacific and other lines discriminate against the Rio Grande (except at points on the Bamber Railroad between Ogden and Salt Lake City) under Section 3(4)° of the Act in refusing to include its line in their through routes and joint rates (R. 72);

14. That (notwithstanding the dissimilarities in transportation conditions over the respective routes) the combination rates via the Rio Grande on the articles named in the order from and to the areas therein described are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, to the extent those rates exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes (R. 73);

15. That the Rio Grande, a railroad, could not raise in its own behalf an issue of undue prejudice and preference under Section 3(1) against another railroad, but that testimony of intervening shippers raised that issue (R. 33), and also raised a question as to a need for "more" adequate and economic service than afforded by Union Pacific routes with respect to perishable food articles (R. 69);

16. That the present complex and far-flung marketing system for perishable food articles requires that such articles move "with expedition and care" and "over as many routes as possible" with "as much flexibility as possible" (R. 70), without "unnecessary interruptions", to "as many markets and outlets as possible" (R. 70, 56);

17. That, while through service over Union Pacific routes in general is as satisfactory to shippers as the service which could be provided over routes including the Rio Grande, this is not true with respect to perishable food articles, and that shippers of those articles from the northwest area "are debarred from effective participation in the widespread system developed for the mar-

keting of such commodities" (R. 70) (apparently, only because, if routed over the longer Rio Grande route to eastern and southern markets, higher rates apply than when routed via Union Pacific routes, for the undisputed evidence shows that those shippers market their products via Union Pacific routes in all 48 states and several foreign countries);

18. That on shipments of perishable food articles reconsigned or accorded transit privileges such as stop-off for partial unloading, storing, or processing in transit, or for feeding or grazing live-stock in transit, *at points on the Rio Grande*, "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that "on such traffic the defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes" (R. 70);

19. That through routes via the Rio Grande and joint rates "the same" as apply over Union Pacific routes for the commodities named in the order between points in the areas described therein are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (R. 73);

20. That there is no indication that witnesses admittedly solicited and procured by the Rio Grande to testify so as to help it win its case were improperly influenced or had been stimulated in any questionable manner (R. 48).

Opinions of the District Court

The majority opinion holds that the Commission's order is valid only to the extent that it embraces shipments of the articles named in the order which must stop

for in-transit privileges at points on the Rio Grande not also served by the Union Pacific.¹³

To that limited extent the majority holds that the evidence supports the order, and that it is valid under Sections 1, 15(3) and 15(4) of the Act and does not violate the direction of Section 15(4), that reasonable preference be given the carrier which originates the traffic; that so limited, it would "eliminate" the contention that the order was for the purpose of assisting the Rio Grande to meet its financial needs and would rest squarely within Section 15(4)(b).

The majority further holds that the order is not valid to the extent that it embraces carload shipments of the articles named in the order which do *not* stop for in-transit privileges at points on the Rio Grande.

The majority holds that the Commission's finding that Union Pacific routes are inadequate is based on the lack of in-transit privileges at points on the Rio Grande (although the Commission's report (R. 48) clearly states the fact that all customary transit privileges are available at points on the Rio Grande) and that upon that finding the Commission had power to require through routes and joint rates.

13 The "transit privileges" described in the majority opinion are feeding and grazing livestock, cleaning, packaging, processing, freezing and storing fresh fruits, vegetables, poultry, food products, butter, eggs and beans, at points on the Rio Grande and later shipped to points east of its eastern termini, and westbound carload shipments of monuments to be stopped for partial unloading at points on the Rio Grande with final destination at points on the Union Pacific northwest of Ogden. The Commission and the courts hold that "transit privileges" are not transportation service, but are "commercial operations."

In sustaining the order "in part" the majority adopted a different theory or legal basis from that of the Commission, in that, the majority sustains the order "in part" upon its own finding from the evidence that transportation service *via the Rio Grande* between the northwest area and the area east of Denver is "inadequate and also inefficient and uneconomical" (R. 166). That is, the Majority condemns service of the Rio Grande's own *proposed route* which both the Commission and the majority find necessary to provide adequate and more economic transportation, whereas, the Commission, correctly holding that it could not require the through routes and joint rates demanded by the Rio Grande "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation", incorrectly condemned Union Pacific routes as "inadequate and less economical than are the Rio Grande routes" because, on shipments of the articles named in the order reconsigned or stopped for processing, storage or other transit privileges *at points on the Rio Grande*, "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply."

The majority holds that the evidence does not support the Commission's finding that present transportation service via Union Pacific routes between the northwest and points east of Denver is inadequate; that the evidence shows that present service over the Union Pacific between such points is adequate and that establishment of "the same" joint rates via the Rio Grande between the northwest and points east of Denver "would not make such service more economical because the rates for such service would only equal the present rates via the Union Pacific between those points" (R. 165). But the majority also holds that establishment of through

routes and equal joint rates on shipments of the articles named in the order that stop for in-transit operations at points on the Rio Grande (not also served by the Union Pacific) is necessary "to provide adequate and more economic transportation" (R. 167), and "will result in more economical transportation" (R. 161).

The majority holds that the Commission is without power to order through routes and joint rates to remove undue preference and prejudice under Section 3(1) between shippers located on different railroads because, if it did so, the short-hauling prohibition of Sec. 15(4) "would be practically emasculated" (R. 164). But the majority also holds that in its requirement of through routes and joint rates in connection with the Rio Grande at points from Ogden to Salt Lake City, the order "is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act" (R. 168). The majority also holds that the order requiring through routes and joint rates which short haul the Union Pacific is valid for the purpose of establishing reasonable joint rates in lieu of the Rio Grande's combination rates found unreasonable by the Commission in violation of Section 1.

Circuit Judge Johnsen, dissenting, holds that the order should be annulled in its entirety, among other reasons, because:

"The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute." (R. 169)

He points out that:

"What the Commission purports to make the primary basis for its establishing through routes and

joint rates over the Rio Grande is 'perishable food articles' (R. 169)

"Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did."

"1. 'Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible*. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process*, be permitted.' (Emphasis mine.) P. 656.' (R. 170)

"* * * the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' because otherwise they will be 'debarred from effective participation in * * * the marketing of such commodities.'" (R. 171)

"* * * the philosophy and standard of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' can not be made the basis for over-riding the short-hauling provisions of section 15(4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any ~~connecting~~ carriers aggregately, and of construing the term 'more economic transportation' to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing." (R. 175)

"It is on the basis of the unqualified use of that standard here in relation to perishable commodities,

and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out." (R. 175)

Observing that where short-hauling other carriers under Section 15(4)(b) is involved, as it is here, the Commission must find that the *proposed* additional route will provide "more efficient or more economic transportation" than that provided by present through routes, and further observing that in final analysis what the Commission's order does is simply to reduce the Rio Grande's combination rates to the level of the joint rates over Union Pacific routes, the dissenting opinion holds:

"* * * where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term 'more economic transportation' under section 15(4), in the addition of another carrier's route as a mere 'bridge' line for such traffic." (R. 172)

Pointing to the Commission's findings of more onerous operating conditions and substantially dissimilar and less favorable transportation conditions on the Rio Grande, and its "brushing aside" of those dissimilarities "without rational demonstration" but by arbitrarily saying they "become relatively insignificant" when spread over hauls of great length, and further pointing to the Commission's finding of discrimination against the Rio

Grande at points on the Bamberger Railroad, without any evidence, but merely upon the lack or absence of evidence concerning either dissimilarity or similarity in transportation conditions along the Bamberger. Circuit Judge Johnsen holds that these instances are "characteristic or in the pattern of the loose and improper basis and manner" in which the Commission has dealt with the entire case and are illustrative of the reasons why the entire order should be stricken down (R. 179).

SUMMARY OF ARGUMENT

Congress has declared that the National Transportation Policy is, *inter alia*, to promote "adequate, economical, and efficient service" to the end of developing and preserving an "adequate" transportation system. A "primary aim" of that Policy is "avoidance of waste", *Texas v. United States*, 292 U. S. 522, 530. The Policy seeks to preserve the earning capacity of "individual carriers" and to avert losses and public injury resulting from "the building of unnecessary lines" of railroad and from cut-throat competition, *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277.

Consistent with its purpose to promote adequate, economical and efficient service, Congress has conferred power on the Commission to order new through routes and joint rates applicable thereto when "necessary or desirable in the public interest", (Section 15(3).) But that power is limited by Section 15(4) which expressly prohibits the Commission from establishing and diverting traffic to a new route where the effect will be to short haul¹⁴ a carrier or carriers directed to participate there-

¹⁴ To short haul a carrier is to require it to contribute to a route substantially less than the entire length of its railroad between the termini of such route.

in, unless existing routes are (a) "unreasonably long", or—

"(b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

As the Rio Grande's demands would short haul Union Pacific routes 925 miles, even though they are as much as 50 per cent shorter than the *proposed* Rio Grande route and, therefore, could not be condemned as "unreasonably long" and short hauled under clause "(a)", the Commission invoked the standards of clause "(b)" as the statutory or legal basis on which to justify its order short-hauling existing Union Pacific routes.

In prescribing a through route, the Commission is required by Section 15(4) to give "reasonable preference to the carrier which originates the traffic", subject to certain exceptions, and the Commission is expressly forbidden by Section 15(4) from establishing a new through route and joint rates to confer a financial benefit upon a particular carrier or to assist any carrier participating in such new route "to meet its financial needs", and from "tinkering" with through routes for that purpose, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575.

Ordinarily the establishment of a new route that short hauls existing routes is ordered upon complaint of shippers where existing routes are shown to be inadequate, inefficient or uneconomical, contrary to the National Policy and that the proposed new route is shorter and will furnish better, more efficient, or cheaper transportation service than that provided by existing routes, within contemplation of the Policy.

The order in the instant case is unique in that it was issued upon complaint filed by the Rio Grande, a chronically bankrupt short line railroad, for the admitted purpose of improving its financial condition by diverting traffic and revenues from existing Union Pacific routes so that the Rio Grande can participate as a "bridge" line in the through transportation between points in the northwest area and points in the eastern and southern parts of the country.

The order is also novel and unprecedented in that it would short haul existing Union Pacific routes 925 miles, which routes originate¹⁵ the traffic and are found by the Commission to be shorter (by as much as 50%), faster and efficient and with "adequate" surplus capacity to haul any foreseeable volume of traffic. The order would divert the traffic and revenues to the longer, mountainous Rio Grande route, which the Commission finds is, "less favorably situated", would require at least 24 hours additional time in transit and one or two more terminal-yard services, and has "more onerous" operating conditions than the Union Pacific or any other transcontinental line. The order is plainly at war with the National Transportation Policy.

I. Since no railroad, in demanding through routes and joint rates to divert traffic from other railroads for a "bridge" haul over its line, could have any other purpose than to enhance its financial position and aid it-

15 The Union Pacific's costs of gathering and hauling to its main lines the involved traffic originated on its 2,900 miles of branch lines in the northwest area range from \$19 to \$106 per car and average \$45.59 per car. These gathering costs are and would be borne entirely by Union Pacific in addition to its cost of the line-haul movement to Ogden, while the Rio Grande, as a "bridge" line, would incur no gathering or originating costs whatever on the traffic it seeks. (Orig. I. C. C. Ex. 27.)

self in meeting its financial needs, and as the President of the Rio Grande admitted that this was its sole purpose in this case, the Commission was prohibited from issuing the order by the provision of Section 15(4) that—

“No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs.”

The Commission may not escape that prohibition by its mere assertion that in reaching its conclusions “no consideration has been given to the financial needs” of the Rio Grande. That assertion is contrary to the Commission’s own recognition of the Rio Grande’s perennial financial needs, and contradicted by and inconsistent with the extraordinary emphasis the Commission gave to the financial importance of “bridge” traffic to the Rio Grande. Nor may the Commission evade the “financial needs” prohibition by altering the “form” of its order in attempting to make it appear that its purpose was to grant “relief” to intervening shippers by reducing the Rio Grande’s combination rates to the level of the joint rates on the Union Pacific routes, *Thompson v. United States*, 343 U. S. 549, 559-560. The order violates the intent of Congress in adding the “financial needs” prohibition to Section 15(4) “to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs”, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575.

The majority of the district court, in “remaking” and limiting the order to shipments actually stopped for transit operations on the Rio Grande, not only failed to save the order from the “financial needs” prohibition but also exceeded its authority and usurped administrative powers.

II. In refusing to judge the validity of the order by the standards of Section 15(4)(b) expressly invoked by the Commission, the district court ignored or violated principles laid down by this Court controlling judicial review of administrative actions, *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87; 332 U. S. 194, 196; *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488. The court clearly erred in refusing to annul the entire order because, *first*, the Commission misconstrued clause "(5)" as authorizing it to condemn and short haul the shorter, faster and adequate Union Pacific routes merely because they are "not available" at points served exclusively by the Rio Grande and higher rates apply on the Rio Grande; *second*, the Commission did not make the special findings required by the standards of clause "(b)" which it expressly invoked; *third*, the Commission forsook the standards of clause "(b)" which it had invoked, and substituted therefor the standards or criteria of its asserted need of the marketing system for perishable articles for as many markets "as possible", as wide a distribution "as possible" and as many routes "as possible"; and, *fourth*, the substituted standard is beyond warrant of the Act and affords no legal basis for the order, nor did the Commission adhere even to that standard.

Upon its own holding that the evidence would not support the Commission's finding that service via Union Pacific Routes is "inadequate", the district court clearly should have held the entire order void. Instead, the court made its own administrative finding that service via the Rio Grande is "inadequate and also inefficient and uneconomical" and substituted that finding as a basis on which it held the short-hauling order could be partly justified. In doing so the court not only usurped adminis-

trative power, but also attempted to save part of the order upon still another unwarranted and illegal basis, for clearly, clause "(b)" does not authorize short-hauling faster, shorter and cheaper existing routes by substituting for them a *proposed* route which, the court finds, is "inadequate and also inefficient and uneconomical."

The legislative history of clause "(b)" clearly shows that its only purpose was to empower the Commission to order through routes that are "shorter or cheaper" than existing routes which could not be condemned as "unreasonably long" and short hauled under clause "(a)" of Section 15(4), but which do not provide the adequate, efficient and economic through service contemplated by clause "(b)", and the National Transportation Policy.

If, as the Commission held, clause "(b)" permits short-hauling the shorter, faster Union Pacific routes because they are not available, and higher rates apply at *points served exclusively by the Rio Grande*, or if, as the district court held, clause "(b)" permits short-hauling the shorter and faster Union Pacific routes because *service via the Rio Grande* is "inadequate and also inefficient and uneconomical", then the carriers' "right guaranteed by Section 15(4)" against short-hauling is wiped out and the short-haul prohibition is "unnecessary surplusage." This Court has steadfastly rejected any such treatment of the short-haul prohibition. See *Thompson v. United States*, 343 U. S. 549, and cases therein cited.

The undisputed facts found by the Commission prove that through service over Union Pacific's shorter and faster routes is not only adequate but greatly superior in every way to any service that could be furnished by the Rio Grande for the through traffic concerned, and the district court erred in refusing to hold that upon those

facts the Commission's view that the law permits it to condemn and short haul Union Pacific routes because they are not available at points served exclusively by the Rio Grande and because higher rates apply on the Rio Grande is foreclosed by this Court's decision in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538.

The Commission not only misconstrued clause "(b)" as authorizing it to condemn and short haul the shorter, faster and adequate Union Pacific routes because they are "not available" at points served exclusively by the Rio Grande and because the latter has higher rates, and to compel "more" adequate service by ordering the longer Rio Grande route at equal rates, but it also departed from and failed to make the special findings listed in clause "(b)". It did not find that the Rio Grande route was "needed" or that it would furnish "more efficient" service, and its finding that the Rio Grande route would furnish "more economic" service is a plain distortion of fact, since its rates are higher, and under the order would only equal those via Union Pacific routes, and the Rio Grande route, found by the Commission to be longer and more onerous, is necessarily less economical than Union Pacific routes.

Being precluded by the basic evidential facts from making the special findings required by the standards of clause "(b)" which it expressly invoked, the Commission forsook the statutory standards and adopted as the basis for its order its own asserted requirements of the marketing system developed for perishable articles for as many markets and outlets "as possible", as wide a distribution "as possible", over "as many routes as possible". In thus substituting its own standard for the statutory standards it had invoked, the Commission clearly exceeded its authority and its order is void.

Chenery cases, supra. If, as it has done in this case, the Commission may cast aside the statutory standard of "reasonable through routes" (Section 1(4)) that are "needed" to provide "adequate and more efficient or more economic" transportation (Section 15(4)(b)) and short haul existing routes upon its mere assertion that perishable articles require as many markets and outlets "as possible", as wide a distribution "as possible" and "as many routes as possible", then it has found a way to short haul every existing through route by compelling additional through routes via every junction of connecting carriers until it has established every "possible" route, or, in other words, to completely emasculate the prohibition against short-hauling existing routes.

The Commission not only forsook the statutory standards of adequate and more efficient and more economic transportation which it had invoked and substituted its own standard of as many markets, outlets and routes "as possible"; for *perishable articles*, but it also departed from its own substituted standard by including ordinary livestock, dried beans and granite and marble monuments in the order.

Both the Commission and the district court misconstrued clause "(b)" in holding that it authorizes short-hauling existing routes by the simple expedient of reducing the Rio Grande's combination rates and equalizing them with the joint rates via Union Pacific routes. The Commission and the court also misconstrued clause "(b)" in holding that it authorizes short-hauling Union Pacific routes for the purpose of making transit privileges (which the Commission finds to be "commercial operations") available on the Rio Grande at the same rates those privileges or commercial operations are avail-

able on the Union Pacific, and, further, in holding that the carefully restricted through route powers may be invoked to remedy rates found to be in violation of Section 1, and Section 3. Since the Commission expressly invoked the standards of clause "(b)" as the legal basis for the order, it must be judged by those standards, and the contention of the Government and the Rio Grande that the Commission's finding of a violation of Section 3(1) may now be used as an "independent basis" for sustaining the validity of the order must be rejected. The Commission's order cannot be upheld upon "considerations" that are "not those upon which its action was based" (318 U. S., p. 92).

Moreover, as the shippers in the northwest area found to be unduly prejudiced when they ship via the Rio Grande are *the same shippers* found to be unduly preferred when they ship via Union Pacific routes, and as all of them are located on Union Pacific routes in the northwest and all of them have the *same choice* of routing their traffic over either the Union Pacific or the Rio Grande, there is no basis in law or fact for the Commission's finding of a violation of Section 3(1); nor would the evidence support such finding, for the Commission may not ignore the substantial differences in "more onerous" transportation conditions which it finds over the Rio Grande compared to conditions on Union Pacific.

III. The Commission's findings, among numerous others, that Union Pacific routes have lower rates, are shorter, faster and are adequate to haul any foreseeable volume of the traffic concerned do not, as a matter of law, support or afford a rational or valid basis for the order short-hauling Union Pacific routes by diverting the traffic to the longer, more onerous and less favorably situated Rio Grande route. Nor did the Commission make findings es-

essential to the validity of its order; for example, it did not find that diversion of the traffic to the Rio Grande "would serve some beneficial purpose such as maintaining good service and improving it", *E. T. C. v. RCA Communications, Inc.*, 346 U. S. 86, 97, or that the Rio Grande route is "needed" or that it will furnish "more efficient" service, or that it is efficiently operated or furnishes satisfactory service, or that it has ability or capacity to haul any additional volume of traffic. The facts found by the Commission and those it did not and could not find from the evidence compel the conclusion that its order is void and the district court erred in refusing so to hold.

IV. The order is not only unsupported by evidence but is contrary to the overwhelming preponderance of the evidence. The testimony on which the Commission based its order was that of a few shippers which the Rio Grande admitted it solicited and procured to testify so as to help it win its case and is, therefore, without credibility, weight or probative force. Since that testimony is the only evidential basis for the Commission's conclusions that the Rio Grande's combination rates are unreasonable and unduly prejudicial, that the Rio Grande route and the prescribed joint rates are necessary "in the public interest", the order is clearly without support of substantial evidence. Moreover, the Commission's findings that the combination rates are unreasonable and unduly prejudicial and that the joint rates via the Union Pacific are reasonable for application via the longer Rio Grande route and are preferential of shippers using Union Pacific routes are based entirely on the fact that the combination rates via the Rio Grande are higher than the joint rates via the Union Pacific and the Commission's report admits that there was no other evidence of record concerning the lawfulness of the rates.

Witnesses for the State public service commissions of Washington, Oregon, Montana, Wyoming and Nebraska, and a far greater number of shippers than the number solicited and procured by the Rio Grande testified that service provided by existing Union Pacific routes is entirely adequate, satisfactory and efficient, and that not only was there no necessity for the longer, slower and more onerous Rio Grande route, but also that diversion of the traffic to that route would jeopardize the ability of Union Pacific routes to continue to furnish the adequate and efficient service they now provide and result in deterioration of that service to the detriment of the public and the shippers using those routes and the economic welfare of communities served by and dependent upon them. The Commission's assertion that shippers in the northwest or originating area "are debarred from effective participation" in the markets for their products is capricious and contrary to the evidence which shows that shippers from that area, including those who supported the Rio Grande, market their products in all of the 48 States and in several foreign countries through the use they now make of Union Pacific routes.

There is no basis in either law or fact for the finding that shippers desiring to use the Rio Grande are unduly prejudiced or disadvantaged because its rates are higher than those of Union Pacific routes for those shippers and all others in the northwest area are located on Union Pacific routes and have exactly the same privilege of routing their traffic over either the Union Pacific routes at lower joint rates or over the Rio Grande route at higher combination rates. The record is devoid of any evidence on which the Commission could base any finding of discrimination against the Rio Grande resulting from the Union Pacific's refusal to establish joint rates with

it while maintaining such rates with the Bamberger Railroad at Ogden and Salt Lake City and intermediate points.

V. Having found that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and unlawfully in failing to dismiss the complaint and in seizing upon the Rio Grande's solicited and procured shipper testimony and ordering through route and joint rates on the theory that because those shippers had testified the complaint became a shipper complaint. The Commission further acted arbitrarily and erroneously in refusing to give effect to the requirement in Section 15(4) that reasonable preference be given to the carriers that originate the traffic concerned, and in refusing to give weight and effect to substantial evidence showing that diversion to the Rio Grande of any substantial part of the traffic it seeks would result in wasteful transportation and economic waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees, and to communities and areas served by and dependent upon them. Further, the entire order should be annulled because of its uncertainty and conflicting requirements, and because the Commission exceeded its authority in using its through route powers to require a rate reduction, to remove undue prejudice and discrimination and to equalize rates via the Rio Grande with those of Union Pacific routes.

ARGUMENT

I.

Upon the Admission by the Rio Grande's President and Other Evidence That the Sole Objective of the Proceeding is to Increase its Revenues and Improve its Financial Condition by Diverting Traffic and Revenues from the Union Pacific and Other Railroads, the Commission Acted Arbitrarily and Contrary to Law in Overruling the Motion to Dismiss the Complaint on the Ground that Section 15(4) of the Act Prohibits the Commission from Compelling Through Routes and Joint Rates for that Purpose, and the District Court Erred in Refusing to Annul the Order on that Ground.

The pertinent provision of Section 15(4) of the Act is that:

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

As no railroad in demanding through routes and joint rates to divert traffic to its line from other railroads could have any other purpose than to enhance its financial position or aid itself in meeting its financial needs, and as the President of the Rio Grande admitted that this was the sole purpose of this case, the Union Pacific moved that the Commission dismiss the complaint on the ground that the quoted provision, to which we shall refer as the "financial needs" prohibition, prohibits the Commission from compelling in whole or in part the through routes and joint rates demanded by the Rio Grande in this case. The Commission overruled this motion and sought to evade the "financial needs" prohibition, first, by stating that in reaching its conclusions

to compel the through routes and joint rates required by its order "no consideration has been given to the financial needs of the complainant" (R. 34), and, *second*, by abandoning the Rio Grande's case, creating new issues, treating the case as if it were a shipper complaint and granting a third of the demands of the Rio Grande under the guise and in the "form" of relief to shippers and "the public" (R. 69).

The first of these two efforts to escape the "financial needs" prohibition is merely an "artificial use of words" and a self-serving "declaration" that cannot be permitted to stand in the face of actual facts and realities, *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545.¹⁶

The Rio Grande's President stated that since he came to that property in 1935 a planned program was progressed to enable the Rio Grande to participate to a greater extent as a "bridge" line in transcontinental traffic, that it has been the policy of the Rio Grande under his management to divert from the transcontinental lines more and more "bridge" traffic, and filing of the complaint in this case is but another step in that direction. On cross-examination, he testified as follows (V. I., 48):

"Q. That is, from the standpoint of what I will say the treasury of the Rio Grande and the stockholders, that would be the purpose?

"A. Yes, we hope to improve our condition if we can get these through rates.

¹⁶ "This Court has refused to accept assumptions of fact which are demonstrably false, *United States v. Provident Trust Co.*, 291 U. S. 272 [286], even when agreed to by the parties, *Swift & Co. v. Hocking Valley R. Co.*, 243 U. S. 284, [289], *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 497.

"Q. Insofar as the corporate management and the stockholders of the Rio Grande are concerned, that would really be the only immediate purpose to them, would it not?

"A. Yes—that they would want to improve the financial condition of our railroad."

He further testified that the reason for pressing for an increased volume of "bridge" traffic over the Rio Grande is that "there is more money in it", than in traffic it originates or terminates (V. I, 50). It has been a part of his program since 1935 to have through routes and joint rates published via the Rio Grande on the traffic involved in this case as a further means of enhancing the financial position of the Rio Grande (V. I, 49).

The "financial needs" of the Rio Grande for the "bridge" traffic it seeks in this case was confirmed by its Vice President of Traffic, witness Hogue, who testified on this point as follows (V. I, 69):

"With the decline experienced in the originated commodities named, plus a heavy tonnage loss of untold volume to other forms of transportation in the states served by the Rio Grande, we are forced to turn our thoughts and efforts to main line through freight traffic. In no other way could we have survived and continged to render rail transportation service to those people of Colorado, Utah, and New Mexico who are reached only by the Rio Grande."

The point is further emphasized in the testimony of witness Earley, Assistant Freight Traffic Manager of the Rio Grande, who described the decline in the local and originated traffic which has not kept pace with the increase in traffic it now takes from connecting lines (V. I, 81) and concluded that: "The importance of overhead or bridge traffic to the Rio Grande is thus emphasized" (V. I, 82).

The Commission's assertion that it gave no consideration to the Rio Grande's "financial needs" is at variance with the allegation in paragraph V, page 2, of its answer to the complaint herein, that the Rio Grande "has numerous branch lines connecting with and extending from its main lines in Utah and Colorado" (R. 92), which quite clearly implies that at least one of the Commission's purposes in issuing the order was to aid the Rio Grande in maintaining and operating its branch lines by diverting traffic and revenues from the Union Pacific. The assertion is also at variance with the Commission's own statement that the Rio Grande "is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul" (R. 68).

The Rio Grande's complaint asked the Commission to issue an order compelling through routes and joint rates via its line for the purpose, stated by its own President, of improving the financial condition of the Rio Grande. The Commission has issued such order. Its assertion that in doing so it gave no consideration to the Rio Grande's financial position necessarily seems futile. If not, then the financial needs prohibition in Section 15(4) is futile, for, to avoid it, the Commission need only deny that it gave any consideration to the financial needs of the carrier that seeks the order for the sole purpose of improving its financial condition.

Furthermore, the Commission's assertion that it gave no consideration to the Rio Grande's financial needs is at variance with the extraordinary emphasis which the report places upon the financial importance to the Rio Grande of "bridge traffic", which is traffic now being transported by the Union Pacific and other railroads and which the

Rio Grande would take at one end of its line and deliver at the other end of its line to another carrier. There can be no public interest in diverting "bridge traffic" from the Union Pacific to the Rio Grande. *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127. "Bridge traffic" is "financial needs" traffic, and since that is the only traffic affected by the order, it cannot be denied that this is a "financial needs" case.

While the report is so written as to de-emphasize, by not discussing the long history of the Rio Grande's bankruptcy and financial distress, it does concede that the Rio Grande passed "through various hands and receiverships" in its early days (R. 34), and that it again went into receivership in 1918 and remained in that status until April 11, 1947 (R. 36). As shown earlier in this brief, the Rio Grande has always been a chronically bankrupt and a "financial needs" short line railroad.

As we have said, the emphasis upon "bridge traffic" throughout its report contradicts the Commission's assertion that in reaching its conclusions it gave no consideration to the Rio Grande's financial needs. The report states that in 1890 the Rio Grande was "opened for through traffic between Denver and Ogden" but was "handicapped" because it did not have joint through rates with the Oregon Short Line on bridge traffic between the northwest and points at or east of its Colorado gateways (R. 35); that the Rio Grande wants to participate as a "bridge line" on such traffic via its Colorado gateways and Ogden at joint through rates (R. 37); that rearrangement of portions of the Union Pacific lines with that of the Rio Grande would enable the latter to obtain a full main-line haul on the involved "bridge" traffic and yet leave the Union Pacific a "substantial" haul west of

Ogden and the possibility of a haul east of Denver (R. 41). The Rio Grande "as a bridge line" is discussed and emphasized by showing that its "bridge traffic" diverted from other railroads increased 326 per cent in the period 1934-1948 and that its revenue from "bridge traffic" increased from \$5,648,891 to \$27,654,086 during that period. The importance of transit privileges on the Rio Grande to attract "bridge traffic" to that line is again emphasized. All of the traffic involved in the long and detailed recitals at pages 635-647 of the report (R. 48-61) is "bridge traffic". The report and order are not concerned with traffic originated or terminated at points on the Rio Grande, for joint rates now apply to that traffic.

There could be no reason for the emphasis which the Commission thus places upon bridge traffic and its financial importance to the Rio Grande except to attempt to justify diverting such traffic to that line so that it may benefit from revenues now earned by the Union Pacific and other carriers which originate or terminate the traffic in the northwest area.

The second method by which the Commission, in giving its order "the form" of relief to shippers and the public, seeks to evade the financial needs prohibition is even more untenable. Acceptance of this method of dealing with the case "would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order," *Thompson v. United States*, 343 U. S. 549, 559. In that decision, which was hardly six months old when the Commission rendered its report and order in the instant case, the Court not only annulled the order because of the Commission's attempt to evade the restrictions in Section 15(4) upon its power

to compel through routes and joint rates by the simple expedient of reducing the sum of the local rates, thus putting its order in the "form" of a case under Section 1 of the Act, but the Court also warned the Commission against the identical result it attempts to accomplish in this case by giving its action "the form" of an order granting relief to shippers and the public. At pages 559-560 the Court said:

"The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of section 15(4), before the Court in *United States v. Great Northern R. Co.*, 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."¹⁷

In the case cited in the quotation, dealing with the very provision which the Commission here seeks to evade by altering "the form" of its order, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, the Court said at pages 574-575:

17 The Commission's defiance of this Court's decision in the *Thompson* case, its efforts to evade the "financial needs" prohibition, as well as the short-hauling prohibition of Section 15(4), and its distortion and abuse of its through routes and joint rates powers in the instant case, are all the more amazing in view of the fact that, although the case was argued and submitted for decision by the full Commission on October 11 and 12, 1951, the Commission withheld its decision until after this Court handed down its decision, June 2, 1952, in the *Thompson* case, significantly, at page 555, warning the Commission against continuation of its past efforts to evade the short-haul prohibition. Whereupon, the Commission ordered complete reargument of the instant case—October 15 and 16, 1952—after which it issued its report and order, January 12, 1953.

"It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended Section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs."

Remedies and rights accorded to shippers by the Act do not give the Commission "a roving commission" to use such rights and remedies to accomplish the purpose of carriers or to attain some objective that the Commission itself may desire, *Interstate Comm. Comm. v. D., L. & W. R. R.*, 216 U. S. 531, 537. In that case, the Commission's order was enjoined and annulled because it "had exceeded its power" in granting demands of a railroad under a provision of the Act which gave only shippers the right to relief.

The result of the Commission's efforts over many years to evade or "limit * * * the impact of the short-hauling restriction on its power to establish through routes"¹⁸ is that in three out of the four short-hauling through route cases reviewed by this Court, the Commission's orders have been stricken down because they violated or ignored the short haul prohibition. See *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538 (1910); *United States v. Mo. Pac. R. Co.*, 278 U. S. 269 (1929); and *Thompson v. United States*, 343 U. S. 549 (1952).

¹⁸ *Thompson v. United States*, 343 U. S. 549, 555-556, and footnotes.

The only short-hauling order of the Commission which this Court has sustained was in *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588 (1945).¹⁹

In *U. S. v. Great Northern R. Co.*, 343 U. S. 562, this Court said at page 575:

"Congress amended Section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs."

The Rio Grande's complaint asked the Commission to indulge in "tinkering" with through routes and "through joint rates" in order that, according to its own President's testimony, the Rio Grande could improve its financial position. In ordering through routes and joint rates on the specified commodities, the Commission has affirmatively responded to the complaint and in so doing it has "tinkered" with through routes and joint rates inevitably to improve the Rio Grande's financial position and help it meet its "financial needs".

If it be said that the Rio Grande is not presently a "financial needs" carrier, then all the more reason why traffic and revenues should not be diverted just to improve an already healthy financial position.

19 But the through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 90 cents per ton and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in some 200 miles of additional transportation over the most "onerous" operating conditions of any western railroad, adding \$124 per car to transportation cost, two additional interchanges between carriers at an additional cost of \$20.44 per car per interchange, and at least one or two days' more time in transit, and would short haul existing routes at least 92½ miles, and would deprive some of the appellant railroads of their entire haul. (R. 41.)

As Section 15(4) prohibits the Commission from helping even the most "needy" carrier financially by compelling through routes to divert traffic from existing routes, *a fortiori* it prohibits compelling through routes to aid the less "needy" or the financially healthy carrier.

The Commission's denial that it gave any consideration to the Rio Grande's financial needs is equivalent to saying that in reaching its conclusions and issuing its order it gave no consideration to the case which the Rio Grande called upon it to decide. In the circumstances the Commission's refusal to dismiss the complaint on the grounds we have discussed ~~was~~ clearly arbitrary, erroneous and contrary to the "financial needs" prohibition of Section 15(4).

The majority of the district court refused to enjoin the order on the grounds just discussed. Instead, it undertook to "remake" the order by limiting it to shipments stopped for in-transit privileges at points on the Rio Grande, not served by the Union Pacific. The majority then held that "[i]f the order had been so limited" by the Commission, "it would eliminate the charge by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial needs" (R. 162).

In both its refusal to test the validity of the order as issued by the Commission, and its attempt to save the order in part by usurping administrative authority to "remake" it, the majority of the district court was clearly wrong. *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, and 332 U. S. 194. Because the order is prohibited by the "financial needs" prohibition of Section 15(4) of the Act, this Court should set it aside and end its consideration of the case right there.

II.

The District Court Erred in Failing to Judge the Order by the Standards the Commission Invoked, and in Substituting its own Standards for Those Used by the Commission; and the Court Further Erred in Refusing to Hold that the Order is Entirely Void Because the Commission Misconstrued, Departed from and Failed to Observe and Make Findings Required by Controlling Statutory Standards and Substituted its own Standards and Criteria for the Statutory Standards it Invoked.

Basic principles laid down by this Court controlling judicial review of administrative actions were ignored or violated by the majority of the district court in sustaining the Commission's order "in part".

In *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, this Court held, at page 87, that:

"The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

The Court said at page 89, the "action must be judged by the standards which the Commission itself invoked", and, pointing out that the grounds urged by counsel to the Court "in support of the Commission's order were not those upon which its action was based", the Court refused to sustain the validity of the order, saying at page 95 that:

"* * * an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

At page 94, the Court repeated the settled rule that "orderly functioning of the process of review requires

that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained", and said that the "action must be measured by what the Commission did, not by what it might have done" and that the action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * j."

The Court remanded the case to the Court of Appeals and, in an opinion in the same case upon its return to this Court the principles just quoted from the Court's first decision were reiterated, *Securities Comm'n v. Chenery Corp.*, 332 U. S. 194, 196:

"This case is here for the second time. In *S. E. C. v. Chenery Corp.*, 318 U. S. 80, we held that an order of the Securities and Exchange Commission could not be sustained on the grounds upon which that agency acted.

* * * * *

"When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

In *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, this Court set aside an order of the Commission because the report and findings did not clearly and definitely show that the Commission had fully complied with ^{or} properly applied statutory standards for granting operating rights to motor carriers. At page 488, the Court said:

Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 144."

1. The district court erred in failing to judge the order as made, and by the standards the Commission invoked; in substituting its own finding, that transportation service of the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical," and sustaining the order "in part" upon the untenable premise that Section 15(4)(b) permits short-hauling Union Pacific routes because service via Rio Grande routes is inadequate.

Section 15(4) of the Act prohibits the Commission from ordering a proposed new through route that short hauls existing routes unless (a) the existing routes are

unreasonably long as compared with the *proposed* new route, or—

“(b) unless the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic transportation”.

As the Union Pacific routes are shorter and could not be found “unreasonably long”, the Commission said that any order requiring through routes and joint rates demanded by the Rio Grande—

“* * * must be grounded upon findings as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate and more efficient or more economic transportation.” (R. 33).

Recognizing that the clear and unambiguous purpose of clause “(b)” of Section 15(4) is to permit short-hauling existing routes *only* when they are inadequate to furnish service meeting all the tests specified in that clause *and where* service which meets all of those tests can and will be provided by a *proposed* new route, the Commission correctly held that it could not order the *proposed* Rio Grande route “unless the *existing* [Union Pacific] routes can be found not to provide ‘adequate’ transportation” (R. 69).

But, in its efforts to condemn and short haul Union Pacific routes, the Commission, without explanation or reason, asserted the palpably erroneous and untenable conclusion that Union Pacific routes are “inadequate” because they are “not available at points on the Rio Grande and because higher rates for the involved traffic apply at points on that line than at points on Union Pacific routes” (R. 70).

The Commission's own findings of facts, *ante* pp. 19-24, prove that service over Union Pacific's shorter and faster routes is not only equal but greatly superior in every way to service via the Rio Grande for the through traffic concerned. Upon those indisputable facts the Commission's view that the law permits it to condemn and short haul Union Pacific routes because they are not available at points not reached by their rails and because higher rates apply on the Rio Grande is precluded by this Court's decision in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, in which this Court held unlawful a short-hauling through route order based on the Commission's conclusion that the Northern Pacific route through the northernmost states to Seattle and Portland was not "reasonable or satisfactory" because it did not serve and was not available at points on other railroads traversing Wyoming and Utah en route to Portland.²⁰ Although

20 In this case, this Court annulled the Commission's order requiring the Northern Pacific to short haul itself by establishing through routes via Portland with the Union Pacific and its connections between Chicago and Seattle, and publishing joint passenger fares "the same" as those of the Northern Pacific between the same points. At that time the Commission's power to order through routes was conditioned by the proviso that "no reasonable or satisfactory through route exists." Holding that the Commission had proceeded upon an erroneous "view of the law," the Court said at pages 544-545:

"But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass. It is admitted that the Northern Pacific route is shorter than that of the Union Pacific by way of Portland and the running time somewhat less, and it is added by the majority that the passenger goes in as good a car and is provided with as good a berth and as good a meal."

"There is some suggestion that at times the northern route may not be as good as the southern, although at other times it may be better, but the ground of the order avowedly was that the personal

(Continued on next page)

clause "(b)" has been added as an exception to the short-haul restriction since the Court rendered the decision just cited, the Commission's interpretation of that clause as authorizing it to short-haul Union Pacific routes because they do not serve points located exclusively on other railroads that maintain higher rates is not merely to "limit by construction the impact of the short-hauling restriction" on the Commission's power to order through routes, but to completely emasculate and nullify the short-haul restriction, *Thompson v. United States*, 343 U. S. 549, 555. Such interpretation of clause "(b)" is diametrically opposed to the purpose of Congress in denying the Commission's request "to delete completely the short-hauling restriction" and in adopting clause "(b)" as a compromise under which the short-hauling restriction was retained subject to the new exception "applicable only where the Commission makes the special findings listed" in Section 15(4) as amended by clause "(b)." (*ibid.*).

The history of legislative action leading to enactment of clause "(b)" clearly shows that the purpose of Congress was to empower the Commission to order additional

(Continued from preceding page)

preferences of many travelers is to go by the Southern way. If they do, it is said, they can select from a great variety of routes as far as Ogden, Utah, they can visit cities not reached by the northern lines, they can search over a wide area for homesteads, they can behold the natural beauties that may be rivalled but not repeated on the other roads. It appears to us that these grounds do not justify the order. The most that can be said of them is that they are reasons for desiring a second through route; but they are not reasons warranting the declaration that 'no reasonable or satisfactory through route exists.' Obviously that is not true, except by an artificial use of words. It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away. Except in case of a need such as the statute implies, the injustice pointed out by the Chairman in his dissent is not permitted by the law."

through routes that are "shorter or cheaper" than existing routes between the same termini which could not be condemned as "unreasonably long" and short hauled under clause "(a)" of Section 15(4). In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

"Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available*. * * * The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate*. If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

The district court refused to decide expressly whether the order was void because of the Commission's construction of clause "(b)", but the court did hold that there was no evidence to support the Commission's finding that Union Pacific routes are inadequate.²¹

21 Under "Findings of Fact I," the majority opinion reads:

"The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points."

Upon that holding, and apart from its erroneous refusal to hold that the order is entirely void because the Commission misinterpreted clause "(b)", we submit that it was clearly the court's duty to enjoin and annul the order in its entirety, for an order based on a finding unsupported by evidence is void, *Int. Comm. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91.

Instead of judging the order as made by the Commission, and disregarding the rules laid down by this Court in the *Chenery* cases, *supra*, that an order "must be measured by what the Commission did, not by what it might have done" (318 U. S. 80, 93-94), and that, if the grounds on which an order is based are inadequate or improper, "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (332 U. S. 194, 196), the district court proceeded to make its own finding of fact that "transportation service" via the Rio Grande "is inadequate and also inefficient and uneconomical" for shipments of the specified articles which require in-transit operations at points on the Rio Grande and re-shipment to final destinations beyond its termini (R.

22 In making these findings of fact the district court clearly exceeded its authority and "usurped an administrative function," *F. P. C. v. Idaho Power Co.*, 344 U. S. 17, 20. Those findings are "a substitution of judicial for administrative discretion," *Communications Comm'n v. WOKO*, 329 U. S. 223, 229. See also *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470, and *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 134, 144. The statute authorizing judicial review of the Commission's order grants the courts no authority "to revise the Commission's decision and to enter such judgment as the Court may think just," *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 276. Instead, the statute authorizes courts "to enjoin, set aside, annul, or suspend in whole or in part any order" of the Commission, 28 U. S. Code § Sec. 1336, and "the court must act within the bounds of the statute and without intruding upon the administrative province," *Jord Motor Co. v. Labor Board*, 305 U. S. 364, 373.

166).²³ The Commission made no such finding, nor did it purport to base its order upon inadequacy of service via the Rio Grande. It avowedly based its order upon its view that under clause "(b)" it had power to condemn Union Pacific routes as "inadequate" and to short haul them because they are not available at points served exclusively by the Rio Grande and because higher rates apply to the traffic if moved via the Rio Grande (R. 70):

In making its own finding of fact the court said:

"If the order had been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15(4)." (R. 162)

The court thus not only failed to judge the order as made and upon the standards invoked by the Commission, and exceeded its judicial authority in usurping administrative power to make its own finding of fact which it substituted as a "more adequate or proper basis" for the order than the basis used by the Commission, but in

23 The court's finding is that:

"II.

"The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver."

doing so, the court also misconstrued, distorted and reversed the statutory pattern and circumstances under which short-hauling existing routes is permitted by clause "(b)". That is to say, Section 15(4)(b) permits short-hauling existing routes when they are inadequate and when it can be found that a *proposed* route will provide adequate and more efficient or more economic transportation than that provided by existing routes, but the court condemns the very route *proposed* to be established as "needed" to provide the "adequate and more efficient or more economic transportation" contemplated by clause "(b)", and holds that short-hauling Union Pacific routes is justified—not because service via those routes is inadequate or fails to meet the tests of clause "(b)" but—because service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical."

To summarize the errors and confusion of both the Commission and the court:

The Commission found that the shorter, faster, efficient Union Pacific facilities "are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (R. 62), and furnish "through service", in general, "as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande" (R. 70). Nevertheless, the Commission found Union Pacific routes "inadequate", *first*, because they "are not available" for perishable traffic reconsigned or accorded transit privileges at points that are not located on Union Pacific routes but are served exclusively by the Rio Grande, and, *second*, because higher rates apply on such traffic via the Rio Grande than the rates via Union Pacific.

Thus, the Commission attempts to justify short-hauling Union Pacific routes not because their service is inadequate, inefficient or uneconomical or that the Rio Grande could furnish better service, but because Union Pacific routes are not available for shipments reconsigned or stopped for transit operations at points served exclusively by the Rio Grande and because Union Pacific routes have lower rates than the rates via Rio Grande.

The court refused to decide whether, as a matter of law, the Commission erred in condemning Union Pacific routes as inadequate and in short-hauling them under clause "(b)" on the sole ground that they are not available at points served exclusively by the Rio Grande and because higher rates apply at Rio Grande points, and, though holding that the evidence would not support a finding that Union Pacific routes are inadequate, refused to enjoin and annul the entire order. Instead, the court held that the evidence does support a finding that "transportation service" *via the Rio Grande* for shipments of the specified commodities from and to the northwest area requiring stoppage for transit operations at points on the Rio Grande "is inadequate and also inefficient and uneconomical", and, substituting that premise, in lieu of the Commission's basis for the order, holds that it is valid as to such shipments.

It is too plain for argument that Union Pacific routes may not be short hauled upon either the ground asserted by the Commission or the substituted ground asserted by the court. It is clear beyond a shadow of a doubt that clause "(b)" of Section 15(4) does not permit short-hauling the shorter, adequate, efficient and more economic Union Pacific routes because, as asserted by the Commission, they are not available for transit operations

at points served exclusively by the Rio Grande, or for the purpose, asserted by the court, of improving the Rio Grande's "inadequate and also inefficient and uneconomical" service, or reducing the cost of it to shippers using the Rio Grande.

If the Commission is correct in its view that Union Pacific routes may be condemned as inadequate and uneconomical, and short hauled by establishment of longer routes via the Rio Grande because higher rates apply on that line, and because the shorter Union Pacific routes with their lower rates are "not available" *at points on the Rio Grande*, then the Commission is at liberty to condemn and short every railroad and every through route in the country as inadequate and uneconomical, and to require them to short haul themselves by joining in through routes that pass through every point on every railroad in the country on the theory that such disregard of the short haul prohibition in Section 15(4) is necessary to provide adequate and more economic transportation.

If the court is correct in its view that the shorter, efficient, and adequate Union Pacific routes may be short hauled because service for shipments requiring transit at points on the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical", then every *existing* through route may be short hauled wherever the Commission can find a connecting railroad that has higher rates and is inadequate, inefficient and uneconomical.

Neither the Commission's nor the court's plain distortion of the Act can afford any possible legal basis for the order, and, because both completely nullify the short-hauling prohibition of Section 15(4), and ignore the

adequate, efficient and economic service admittedly provided by existing Union Pacific routes, the order clearly is void and must be annulled. *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538; and *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *Thompson v. United States*, 343 U. S. 549, 560.

2. The district court erred in refusing to enjoin the entire order because the Commission misconstrued, departed from and failed to make the special findings required by Section 15(4)(b) which it expressly invoked as the basis of the order.

The Commission is authorized by Section 15(3) of the Act to compel a carrier to join in a through route that does *not* short haul it upon a finding that such route is "necessary or desirable in the public interest." But that finding is not a lawful basis for an order compelling a carrier to join in a through route which *does* short haul it. Before it can compel a carrier to join in a through route that *does* short haul it, the Commission must find upon substantial evidence that one or more of the exceptions to the short-hauling prohibition in Section 15(4) has been established by the evidence. Such findings are prerequisite to the exercise by the Commission of its jurisdiction or power to compel through routes that short haul a carrier. In the absence of findings clearly stated in the report from which the Court can discern with certainty that the exception invoked by the Commission is fully satisfied, there is no basis for the order and it must be enjoined.

This was clearly recognized by the Commission in the instant case and it was definite in specifying the exception and the precise standard invoked by it in ordering through routes and joint rates. After finding

that there were no through routes via the Rio Grande for the traffic it seeks, the Commission stated (R. 33):

“ * * * that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.”

The specific exception to which the Commission refers is Section 15(4)(b) which authorizes the Commission to order a new route that short hauls existing ones if “the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or²⁴ more economic, trans-

24 The Commission and the courts construe the word “or” in this context as meaning “and”. In *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, at page 343, the Commission said:

“We interpret that exception to mean adequate and more efficient and more economic from the public’s or shippers’ as well as the participating carriers’ standpoint” (Emphasis supplied.)

That interpretation was sustained by the three-judge court in *Pennsylvania R. Co. v. United States*, 54 F. Supp. 381, in an opinion which was affirmed by the Supreme Court, *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, at page 593. The Commission has consistently adhered to that interpretation.* *Richards Milling Co. v. Erie R. Co.*, 268 I. C. C. 237, 240; *General Mills, Inc., v. Great Northern Ry. Co.*, 269 I. C. C. 457, 465; *Borough of Edgewater, N. J. v. Arcade & A. R. Corp.*, 280 I. C. C. 121, 142. (Order held valid in *Baltimore & O. R. Co. v. United States*, 100 F. Supp. 1002).

Interpretation of the word “or” as meaning “and” has long had the approval of the courts when such interpretation is necessary to give effect to the clear intention of the legislature. *United States v. Fisk*, 70 U. S. 445, in which the Court said at page 447:

“In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe ‘or’ as meaning ‘and’ and again ‘and’ as meaning ‘or.’”

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portation". But this authority is "applicable only where the Commission makes the *special findings listed*" in Section 15(4) as amended by clause "(b)", *Thompson v. United States*, 343 U. S. 549, 555. (Italics added.)

In *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, this Court held at pages 592-593:

"* * * if the Commission is asked to abrogate the general rule with regard to the short-haul, *the statute says it must have regard to several matters*. The first of these is *adequacy of transportation*. The expression would seem to apply only to the interest of the shipping public. The second and third matters to be considered are *efficient and economic transportation*. These expressions may well embrace both shippers' and carriers' interests." (Italics added.)

That is to say all of the words taken together in clause "(b)" constitute a "standard" pursuant to which

(Continued from preceding page)

The Commission's interpretation, sustained by this Court, of the word "or" as meaning "and" is necessary to conform clause (b) of Section 15(4) with the declared purpose of the National Transportation Policy to promote "safe, adequate, economical, *and* efficient service *and* foster sound economic conditions in transportation and among the several carriers," and to the "Rule of Rate Making" in Section 15a of the Act. In other words, all of the descriptive words are in the conjunctive and not the disjunctive. Each word or term specifies one of several desired elements, aspects, or attributes, and the accomplishment of each of them is essential—"all to the end" of providing "a national transportation system" that is "adequate to meet the needs" of the country. The same ultimate objective is the basis of permitting the Commission to short haul a carrier under clause (b) of Section 15(4).

In *California Milling Corp. v. Atchison, T. & S. F. Ry. Co.*, 276 U. S. 531, the Commission's finding at page 555 was that through routes and joint rates there prescribed were needed in order to provide "adequate and more economic transportation," omitting the finding of "more efficient" transportation. There was no court decision in that case and the finding there made does not have judicial sanction.

the Commission, upon evidence meeting *all* requirements of that standard, may short haul a carrier, but the Commission may not pick and choose particular words from or parts of the complete standard prescribed by Congress in clause "(b)". It must apply the standard as Congress wrote it, and it is not at liberty to depart from it, or to make a new or different standard by adding to, taking from or ignoring any part of the statutory standard. In *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, this Court set aside an order of the Commission because the report and findings were insufficient to show definitely that the Commission had fully complied with the statutory standard for granting operating rights to motor carriers. At page 489 the Court said:

"Congress has made a grant of rights to carriers such as appellee²⁵. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those

- 25 The right of carriers to their long hauls has been granted and reserved to them by Congress throughout the life of the Interstate Commerce Act. It is "a right guaranteed by Section 15(4)" of the Act, and it may be taken from them by the Commission only when it complies strictly with one or more of the exceptions specified in Section 15(4). *Thompson v. United States*, 343 U. S. 549, 556, 559.

The reason for the prohibition against short-hauling a carrier and the limitation upon the Commission's authority to compel through routes was explained by Senator Elkins in 1910 as follows (see page 2, Report No. 404, April 22, 1937, by Senate Committee on Interstate Commerce, on S. 1261):

"The second exception to the grant of this power is one which has always been recognized in the transportation business of the country. The road that initiates the freight and starts it on its movement in interstate commerce should not be required, where it is a line not unreasonably long, to transfer its business from its own road to that of a competitor, especially when the commerce initiated by it can be as promptly and safely transported from the point of shipment to the point of destination by its road as by the line of its competitor."

standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. * * * An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 144. Hence, that requirement is not a mere formal one."

The necessity of strict adherence by an administrative agency to statutory standards is sharply illustrated in *Western Air Lines v. C. A. B.*, 347 U. S. 67, and *Delta Air Lines v. Summerfield*, 347 U. S. 74. In those cases the statutory standard for subsidy rates was "the need" of the carriers for subsidies. The Board allowed profits in addition to the "needed" subsidies. Rejecting that action, this Court said:

"The difficulty here is that the Board, in concluding that a part of the profits from the sale to United should not be used as an offset, forsook the standard of 'need' and adopted a different one." (347 U. S., p. 72)

As noted above, the Commission correctly held (R. 69) that it could not order through routes via the Rio Grande "unless the existing routes can be found *not* to provide 'adequate' transportation."²⁶ The ma-

²⁶ The essentiality of a finding that existing service is "inadequate" as a prerequisite to ordering or permitting additional competitive service lies in the fact that such finding has been regarded as "jurisdictional." Both the Commission and the courts "have recognized inadequacy of existing facilities as a basic ingredient in the determination of public 'necessity'." *Hudson Transit Lines v. United States*, 82 F. Supp. 153, 157, setting aside a portion of a

majority of the district court said that "[o]uly in the event there was inadequacy of transportation can the question of efficiency and economy be reached" (R. 160).

Thus, as construed by the Commission and the courts, the standard of Section 15(4)(b), expressly invoked by the Commission, required each of "the special findings" that—

1. Union Pacific routes are "inadequate", and
2. the proposed Rio Grande route is "needed" in order to provide
 - a. adequate transportation, and
 - b. more efficient transportation, and
 - c. more economic transportation
 than the transportation provided by Union Pacific routes.

And, if the shorter and faster Union Pacific routes with lower rates and surplus capacity, could *not* be found, upon substantial, rational and probative evidential facts, to be "inadequate" for the transportation of the involved perishable and other products between the far northwest area and points in the eastern and southern parts of the country, then the Commission's inquiry and proceedings must end.

The Commission observed that the Rio Grande did *not* allege or contend that Union Pacific routes "are not adequate for the traffic hauled, and no finding is sought

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Commission order authorizing additional competing service without "any finding that the existing service is inadequate." The opinion of the three-judge court, by Circuit Judge Swan, cites numerous cases on this point, and was affirmed per curiam by this Court, 338 U. S. 802. See also, *I. C. C. v. Parker*, 326 U. S. 60, 69, 70, 74; *Florida v. United States*, 282 U. S. 194; *United States v. B. & O. R. Co.*, 293 U. S. 454, 463-465; *American Trucking Assn. v. U. S.*, 326 U. S. 77, 86; *U. S. v. Detroit Navigation Co.*, 326 U. S. 236, 240.

by the complainant [Rio Grande] to that effect", but that testimony of shippers raises a question as to the need for "more adequate and economic service than afforded by existing routes with respect to some commodities" (R. 69).

While, as indicated above, the Commission was fully aware of *all* the elements required to be found under the standard of Section 15(4)(b), its finding and conclusion as to through routes and joint rates was as follows:

"We conclude: 1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established * * *." (R. 73)

The very wording of the Commission's finding shows that it departs from and fails to meet the requirements of the standard in clause "(b)". The errors, omissions and deficiencies which nullify this finding and the order based upon it are these:

First, the Commission correctly held that the Rio Grande route could not be compelled under clause "(b)", "unless the existing routes can be found *not* to provide 'adequate' transportation." But, the Commission had already found that existing routes are "adequate". Discussing the routes of the Union Pacific, it found:

"Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future." (R. 62)

The court agreed that:

"There is no evidence to support a finding that the physical transportation facilities furnished by the

Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate." (R. 160).

"The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific." (R. 162)

Thus, at the very threshold the Commission, with the court's acquiescence, correctly made the basic finding which clearly called for dismissal of the complaint and which contradicts and precludes the later assertion that Union Pacific routes are "inadequate" (R. 70). The Commission cannot make transportation service of existing routes "inadequate" by mere "declaration" or "by an artificial use of words"; nor does a desire for an additional route warrant condemning existing routes as "inadequate", especially where, as in this case, the Commission has already found Union Pacific routes "adequate." "The condition in the statute is not to be trifled away", *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545.

Second, having found that the Union Pacific routes are "adequate" to haul any volume of traffic that might be offered in the foreseeable future, and that the Rio Grande does not contend or allege in its complaint that the present routes of the defendants are not adequate for the traffic hauled, the Commission sought to escape its dilemma by enlarging or expanding the authority conferred by the clause, saying that shipper testimony raises the question as to the need for "more" adequate and economic service. Thus, the Commission, although holding that it may not require additional routes if service of existing routes is "adequate", contradicts itself by holding that the question here is not whether service of ex-

isting routes satisfies the statutory standard of "adequate" transportation contemplated by Section 15(4)(b) but whether there is need for "more" adequate service than existing routes afford. This is not merely to construe or interpret the standard erroneously, but to enlarge the Commission's power by adding the word "more" to the statutory standard. As thus expanded and applied by the Commission, "adequate" means "more adequate", which necessarily means "more than adequate". By construing "adequate" to mean "more adequate", the Commission has created and substituted its own new and enlarged standard for that fixed by Congress to be used in determining whether it is justified in ordering a new route which short hauls existing ones.

Clearly, if the Commission may lawfully compel an additional short-hauling route on the premise that the more routes there are the "more adequate" the service will be, then the standard of "adequate" transportation fixed by the Act becomes meaningless, and the Commission's power to nullify the prohibition against shorthauling a carrier is complete. For, no matter how "adequate" the service afforded by existing routes, the Commission could always say, with logic and plausibility, that an additional route would afford "more" adequate service than that rendered by existing routes, and this process could be pursued until the Commission had compelled through routes and joint rates via every junction where tracks of two or more railroads connect.

Third, to justify exercising its power under clause "(b)", the Commission must find specifically that the proposed route is "needed". It has not so found here, the finding being merely that the Rio Grande route is "necessary and desirable in the public interest", which

is the more general finding required by Section 15(3) only in compelling a carrier to join in a route that does not short haul it. In short, the Commission "forsook the standard of 'need' and adopted a different one", as did the Board in *Western Air Lines v. C. A. B.*, *supra*, page 72, causing this Court to set the order aside.

In *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, at page 592, the Court rejected the contention that the words "necessary and desirable in the public interest" in Section 15(3), and the words "needed in order to provide adequate, and more efficient or more economic, transportation" in clause "(b)" of Section 15(4) are redundant as permitting short-hauling merely if the Commission thought it "in the public interest". Saying that "Congress had a purpose in amending the provision" in Section 15(4) against short-hauling, the Court made it plain that the requirements of all the elements specified in clause "(b)" must be fully satisfied before a carrier may be short hauled under that clause. While the Court did not attempt to draw the line between a new route that is "needed" for the purposes specified in clause "(b)" and one that is merely "necessary or desirable in the public interest" under Section 15(3), the decision makes it certain that the requirement of clause "(b)" for a finding that the proposed route is "needed" cannot be avoided by the Commission or satisfied by a finding in terms of the looser and more general expression, "necessary or desirable in the public interest" used in Section 15(3).

Lacking the finding that the Rio Grande routes are "needed", an essential condition precedent has not been satisfied, leaving the Commission's ultimate conclusion deficient and inadequate to support the order.

Fourth, to justify short-hauling a carrier under clause "(b)", the Commission must also find upon substantial evidence that the proposed route will provide "more efficient" transportation service than that furnished by existing routes. The Commission itself admits that in making a finding to justify short-hauling a carrier under clause "(b)" it "must" give consideration to the "efficiency" as well as the economy of the transportation (R. 69). It has not made the finding that the Rio Grande will provide "more efficient" transportation than is provided by Union Pacific routes, and the order is void because of this further deficiency. Being precluded from making that finding by the facts of record and its own findings that operating conditions are "more onerous" on the Rio Grande, that routes via its line would be longer and require one or two more interchanges and at least a day more in transit time, the Commission has arbitrarily ignored the essential requirement of the clause for a finding that the *proposed* route will provide "more efficient" transportation than existing routes. This it may not do. Attainment of "efficient service" is one of the fundamental aims of the National Transportation Policy, which directs that "[a]ll of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." In *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, the Court said, at page 25, that the Act is concerned with adequacy of transportation service, and its essential conditions of "economy and efficiency" and "best use of transportation facilities."

The Commission's report says that "through service over defendants' routes, in general, is as satisfactory" (R. 70), as any that the Rio Grande route could provide, except as to the perishable commodities specified, which shippers may desire to reconsign or stop off for some

"commercial operation" (R. 48) called a "transit privilege", at local points on the Rio Grande. The report does not explain why the shorter and faster Union Pacific routes are not "efficient" for transporting perishable commodities which, it says, must move to markets "with expedition and care", or how the longer and "more onerous" Rio Grande route will be able to render the "more efficient" service required by clause "(b)". Thus, if it be contended that the Commission gave any consideration at all to the "efficiency" of transportation, since all of the traffic is "through" or "bridge" traffic requiring "through" transportation service as distinguished from "local" transportation between points on the Rio Grande, the Commission's test of the efficiency of Union Pacific routes in hauling a carload of apples, for example, from Yakima, Washington, to Chicago, apparently is whether the apples could stop for some "commercial" service *at local points on the Rio Grande*. And, since the report makes it plain that the only purpose of ordering the route via the Rio Grande is to enable shippers desiring to use that line to "reconsign" or to "stopoff for partial unloading, storing" (R. 70), or other in-transit privileges and services at the same transportation rates they pay when those privileges are exercised on the Union Pacific, it results that the order is based not upon the statutory criteria of adequacy, efficiency and economy of transportation, but upon the wholly erroneous view that the Commission can use its through route powers for the purpose of making "commercial operations" available on the Rio Grande for the same rates at which they are available on the Union Pacific routes.

The Commission's ultimate finding and conclusion clearly is not that which is required by clause "(b)" before the Union Pacific may be short hauled on the theory

that the Rio Grande route is "needed" to provide "adequate, and more efficient or more economic, transportation". Findings that the Rio Grande route is "needed" and that its service will be "more efficient" than that rendered by Union Pacific routes are essential prerequisites to the exercise of the power granted by clause "(b)" to compel a route that short hauls existing routes, and the Commission's inability to make those findings from the facts and evidence may not be overcome by such jumbling of standards of Section 15(3) with those of Section 15(4), or by rearranging, adding to and deleting from the language of clause "(b)" as it has indulged in this case. The absence of those findings renders the Commission's order void. In *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504, the Court said:

"This Court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States*, 282 U. S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454."

Fifth, the Commission's finding that through routes and joint rates via the Rio Grande are necessary to provide "more economic transportation" (R. 73), is obviously based upon the erroneous view that the requirement of clause "(b)" that the proposed route will provide "more economic transportation" means "more economic" transportation than that now provided by the Rio Grande under the higher combination of local rates. Use of the through route power was not appropriate to attain that result for it could readily be obtained directly by reducing the Rio Grande's rates if they were unreasonable under Section 1 of the Act.

The majority of the district court rejected this error of the Commission's as to shipments *not* stopped for in-

transit operations at points on the Rio Grande, saying that (R. 165):

"* * * the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would *not* make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points."

But, incredibly, the majority adopted the Commission's error as to shipments *stopped* for in-transit operations at points on the Rio Grande, saying that for such shipments, establishment of the through routes and joint rates via the Rio Grande "will result in more economical transportation" (R. 161).

Of course, reducing the combination rates and requiring joint rates via the Rio Grande "the same" as rates maintained on Union Pacific routes will make transportation "more economic" than it now is via the Rio Grande under the present combination rates. But, quite clearly, that result does not meet the requirement of clause "(b)". To justify compelling a proposed route that short hauls existing routes, clause "(b)" requires a finding, among others, that the *proposed* route will provide "more economic" transportation than that provided by the *existing routes*. The Commission has not made that finding, and it obviously was unable to make it in the face of the fact that it merely orders "the same" rates, or an equalization of rates via the Rio Grande with those maintained via existing Union Pacific routes through Wyoming. Nor could the Commission make that finding in the face of other facts it had found, that the Rio Grande line is longer, requires at least 24 hours more

time in transit and one or two more interchanges with other carriers, has "more onerous" operating conditions than those of the Union Pacific or any of the other trans-continental lines, and is "less favorably situated" than the line of the Union Pacific.

Circuit Judge Johnsen refused to be deluded by the Commission's—

"* * * merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term 'more economic transportation' to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing." (R. 175)

He denies that the Commission has power to open up a new or additional short-hauling through route—

"* * * in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15(4) of the Act, 49 U. S. C. A. § 15(4), where the element of short-hauling another carrier is involved, as it is here, that such an added through-route must also provide 'more efficient or more economic transportation' than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15(3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide 'more economic transportation,' since they obviously are lower than the previous combination rates." (R. 171)

He gravely doubts whether—

“* * * the Commission's power to establish joint rates under section 15(3) has any relationship to the term ‘more economic transportation’ in section 15(4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term ‘more economic transportation’ in section 15(4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportation comparison from the standpoint of the interests of both the public and the carriers—and that the Commission's power to establish joint rates under section 15(3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15(4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

“But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term ‘more economic transportation’ under section 15(4), in the addition of another carrier's route as a mere ‘bridge’ line for such traffic. If that be not so, then there is not any situation in which the Commission can not make a finding of ‘more economic transportation’ for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.” (R. 172)

The failure and inability of the Commission to make a rational or valid finding that the Rio Grande's line is needed to and will provide “more economic” transportation than that provided by Union Pacific routes leaves the order without support of this essential jurisdictional finding, and without it the order is void.

These new interpretations, misinterpretations and mutilations of the Act and the statutory standard invoked by the Commission are but the latest of its perennial efforts, recognized in this Court's decisions, to nullify or "limit by construction the impact of the short-hauling restriction on its power to establish through routes," and they must be rejected, *Thompson v. United States*, 343 U. S. 549, 555; *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575; and see *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 277.

3. The district court erred in refusing to enjoin the entire order because the Commission forsook the statutory standard of Section 15(4)(b) expressly invoked by it, and adopted its own standard, based upon its asserted requirements of the marketing system for perishable food products for "as many routes as possible."

The Commission said at the beginning of its report that any requirement of through routes and joint rates via the Rio Grande must be grounded upon findings specified in Section 15(4)(b) (R. 33), but nearing the end of its report it is quite obvious that the Commission forsook the standards of Section 15(4)(b) and adopted its own new standards based on claimed requirements of the perishable food marketing system for "as wide a distribution as possible" to "as many markets and outlets as possible" with "as much flexibility as possible" and "over as many routes as possible" (R. 70).

The report clearly shows that the Commission thought the marketing system for perishable food articles from the northwest area requires more transportation facilities than could be compelled under the statutory standard of "reasonable through routes" required by Section 1(4) or under the standard of routes

that are "needed" to provide "adequate and more efficient or more economic transportation" as provided in Section 15(4)(b).

Thus, the Commission not only failed to adhere to the statutory standard invoked by it, but adopted new standards and criteria of its own which go the fullest possible distance beyond and are wholly unrelated to routes that are "needed" to provide "adequate and more efficient or more economic transportation". In basing its order on the requirements of the marketing system for perishable food products for as many markets and as many routes "as possible", the Commission has clearly and arbitrarily gone far beyond the power granted by the Act to compel through routes and joint rates that short haul existing routes.

We can best demonstrate the Commission's action in this respect by quoting at some length from the discerning and penetrating dissent of Circuit Judge Johnsen:

"What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is 'perishable food articles.' Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific] . . . market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon and Washington] need as many markets and outlets as possible.' 287 I. C. C. at page 642. To comprehend or evaluate that need, says the Commission, 'it is necessary to consider the nature, extent and functioning of our intricate and far-

thing 'commodity marketing system.' P. 655. The importance, in our condition of growing population and national development, of having 'a constantly expanding flow of diverse commodities' and 'particularly articles of food' is emphasized. The comment is made that 'A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible,' and the truism is expressed that 'Adequate transportation facilities and services are required for the proper functioning of the system.' P. 656.

"Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

"1. 'Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible*. This requires that many routes be open in order ~~that~~ unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process*, be permitted.' (Emphasis mine.) P. 656.

"2. 'A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities.' In-transit privileges, 'such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit,' are available at various points on the Union Pacific to through-shippers, on the basis of the joint rates applicable over that route, and similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these ad-

ditional facilities would be able to enjoy them on the same basis as those on the Union Pacific. 'Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union Pacific, The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities.' P. 656.

...3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them 'from effective participation in the widespread system developed for the marketing of such commodities.' In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' because otherwise they will be 'debarred from effective participation in * * * the marketing of such commodities.' (R. 169-171)

* * * * *

* * * All I say is that the philosophy and standard of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' can not be made the basis for overriding the short-hauling provisions of section 15(4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term 'more economic transportation' to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

"The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportation concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportation conditions, realities and consequences, such as I think the Commission here did." (R. 175)

We submit that Circuit Judge Johnsen is correct in his analysis of the Commission's report and in his conclusion that the order in reality is based not upon transportation standards and criteria provided by the Act but solely upon the Commission's concept of the requirement of the marketing system for perishable food articles that such articles must have as many markets and outlets "as possible" and move "over as many routes as possible". Indeed, the report clearly shows that the Commission's last hope of granting any part of the Rio Grande's demands lay in carving out perishable food products from the general body of the traffic and asserting that the marketing system for those products requires all "possible" transportation routes and service, regardless of statutory standards which require that carriers provide only "reasonable" transportation. The report states (R. 70):

"While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the

originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities."

The report makes no attempt to explain why the through service of Union Pacific's routes, which it admits are shorter, faster and have lower rates, for the perishable traffic from the northwest area to markets in the eastern and southern parts of the country is not as satisfactory as service that could be provided by including the Rio Grande's longer and more onerous route, and the absence of any explanation is particularly significant in view of the Commission's finding that the perishable articles must be moved to market "with expedition and care" and without "unnecessary interruptions". Although the shippers of perishable products from the northwest area testified that they now market those products in all of the 48 states and in several foreign countries, the Commission was content merely to say that those shippers "are debarred from effective participation" in the marketing system for such products, apparently and solely because, lacking equal rates via the Rio Grande route, they do not have "as many routes as possible" at exactly the same rates.

The Commission's further implication that the Rio Grande route at equal joint rates is needed to provide additional transit privileges on that line so that perishable products could be stopped and held at points on the Rio Grande for as long as twelve months for storage, processing, etc., not only contradicts its finding that these perishable products must move "with expedition and care" in order to avoid "unnecessary interruptions", but also ignores the fact that the same shippers of the same perishable products from the northwest to the same

eastern destinations already have available at points on the shorter, faster Union Pacific routes at lower rates, all of the same transit privileges they would have on the Rio Grande under the Commission's order.

The order clearly must be set aside because (1) the Commission forsook the transportation standards of Section 15(4)(b), which it purported to invoke, and adopted a different standard, *Western Air Lines v. C. A. B.*, 347 U. S. 67, 72, and *Delta Air Lines v. Summerfield*, 347 U. S. 74, and (2) because the Commission is without power to order through routes that short haul existing routes on the theory or premise that the requirements of the marketing system for perishable food products are such that the transportation standards of the Act requiring only reasonable through routes and adequate, efficient and economical transportation, must be abandoned as to those products because of the Commission's unsupported assertion that they require "as many routes as possible", *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538.

4. By including marble and granite tombstones and ordinary livestock in its order, the Commission departs from its own criterion that short-hauling Union Pacific routes is justified as to perishable food products, because the marketing system for those products requires "as many routes as possible."

Having abandoned the transportation standards and criteria of the Act and adopted its own criterion that food products of a perishable nature from the northwest area to the east and south require "as many routes as possible", the Commission immediately proceeded to depart from its own criterion by including in that category or classification westbound granite and marble

tombstones,²⁷ saying merely that:

"In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established." (R. 70)

Again departing from its perishable food criterion, the Commission included in its order eastbound "ordinary livestock" from the northwest area to be stopped for grazing at points along the Rio Grande, for which its only explanation is as follows:

"We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden Gateway." (R. 56)

These departures by the Commission from its own newly created standard for short-hauling are best described and discussed in the following comments in the dissenting opinion of Circuit Judge Johnsen:

"Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standards of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' is, as previously indicated, 'perishable food articles.' But it has, by means of some artificial classification, included ordinary livestock as a perishable food article (p. 656), say-

27 The Commission's inclusion of granite and marble tombstones and ordinary livestock within the category of perishable food products calls for application of the observation in *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 497, that:

"This Court has refused to accept assumptions of fact which are demonstrably false, *United States v. Provident Trust Co.*, 291 U. S. 272 * * *."

ing merely, before doing so, that 'We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway.' And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through rate basis, some individual monuments out of an estimated four-carload lot of monuments, per year.²⁸

"All of this to me is but another attempt by the Commission to gain a new foothold under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All this is fa-

28 In his footnote 2 Circuit Judge Johnsen said:

"I shall not take the time to go into details of this trivial monument situation, which the Commission characterized as one of 'urgent need' (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country."

miliar history in the railroad world, and I shall not bother to go into it further here." (R. 173-174)

"Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 614, 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15(4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure, as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations." (R. 177)

We submit that the following conclusions of Circuit Judge Johnson are correct and should be the decision of this Court:

"It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out." (R. 174)

* * * * *

"I would strike down the Commission's order generally, on the basis and manner in which its result has been reached. * * * The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right there." (R. 179)

5. The conditions specified in the exceptions to the short-hauling prohibition in Section 15(4) cannot be met or satisfied, as the Commission here attempts, by merely substituting the lower joint rates of Union Pacific routes for the higher combination rates via the proposed Rio Grande route.

"* * * all the confusion in which the [r]eport has been wrapped", to use Circuit Judge Johnsen's description, leaves it difficult, if not impossible, to understand or reconcile various aspects of the Commission's report and order. One thing, however, is certain, namely, that, despite its long and discursive report, its various unexplained conclusions and its inconsistencies, the end result is that the Commission merely requires that the lower joint rates of Union Pacific routes be substituted for the higher combination rates of the Rio Grande. To accomplish this result, the Commission expressly declares

that it invoked its powers under Section 15(4)(b) to short haul Union Pacific routes.

We submit that a mere substitution of the joint rates for the Rio Grande's higher combination rates does not conform to or satisfy the requirements of Section 15(4)(b). Those requirements relate to the adequacy, efficiency and economy of transportation facilities, routes and service, while the reasonableness of rates involves the question whether or not the charges are too high for the services performed in the light of such basic facts as volume of the traffic, length of haul, value of commodities, competitive, operating and other conditions which influence cost and value of service. The through routes powers are for the purpose of compelling a sufficient number of routes adequately to transport the traffic from origins to destinations. The reasonable rate powers are for the purpose of preventing carriers from demanding extortionate or exorbitant charges for the services they perform in hauling the traffic of a shipper or shippers of traffic over a route or routes already in existence. There may be and usually are more than a sufficient number of through routes adequately, efficiently and economically to haul the traffic, thus satisfying the statutory requirement, Section 1(4) of the Act, that carriers shall establish "reasonable through routes", and yet the rates charged for transportation over those routes may be so high as to be "unreasonable". Clearly, the prescription by the Commission of a rate that is "reasonable" in lieu of a rate that is "unreasonable" would not satisfy or meet the requirements of Section 15(4)(b) for through routes that are needed to provide adequate and more efficient or more economic transportation where a sufficient number of routes to meet those requirements have not been voluntarily established by

the carriers. In short, the reasonableness of a rate has nothing whatever to do with adequacy or efficiency of transportation, and whatever relation the reasonableness of a rate has to "economic transportation" is a matter to be dealt with by the Commission under Section 1(5) and Section 15(1) of the Act.

Just as the Commission may not use its reasonable rate powers to defeat the requirements of Section 15(3) and (4), as this Court held it could not, in *Thompson v. United States*, 343 U. S. 549, neither can it use its through route powers to prescribe reasonable rates, or to equalize rates of different railroads.

6. The district court erred in holding that the Commission has power under Section 15(3) and (4) to short haul Union Pacific routes by reducing and equalizing the Rio Grande's combination rates with the joint rates of Union Pacific routes, for the sole purpose of making "in-transit privileges" available on the Rio Grande at the same rates those privileges are available on Union Pacific routes.

Although the majority of the district court erroneously assumed that there are no transit privileges available at points on the Rio Grande, and proceeded from the premise that "the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15(4)" (R. 161), it sanctions and upholds the Commission's ordering of through routes and joint rates not only for the purpose of making transit privileges available on the Rio Grande but also for the purpose of reducing the Rio Grande's rates to equalize them with the rates under which transit privileges are available on Union Pacific routes. The majority opinion states (R. 161):

"We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. *Pennsylvania R. Co., et al. v. United States, et al.*, 323 U. S. 588, 54 F. Supp. 381."

While the lack of specificity, in which the Commission's report abounds, apparently confused the majority of the district court, it is clear that the Commission understood that all customary transit privileges are available on the Rio Grande (R. 48) and that the Commission's real and fundamental purpose was to reduce and equalize the Rio Grande's rates with those of Union Pacific routes so that transit privileges offered by the Rio Grande would be available at exactly the same rates they are available on Union Pacific routes. And, to the extent it sustains the order, this is what the opinion of the majority of the district court sanctions and upholds.

* We submit that the court plainly erred in holding that the Commission has power under Section 15(4)(b) to order through routes and joint rates for the sole purpose of making transit privileges available on the Rio Grande and that it further erred in sustaining the Commission's requirement that the Rio Grande's rates be reduced and equalized with those of Union Pacific routes so that transit privileges offered on both sets of routes would be available at the same rate.

Section 1(3)(a) of the Act defines the various elements and services included in the term "transportation"

which carriers are required by Section 1(4) to furnish upon reasonable request. That definition does not include "in-transit privileges". Hence, the Commission may not order carriers to establish or furnish "in-transit privileges". For the Commission obviously is without authority to order the carriers to furnish what the statute does not require.

A so-called "transit privilege" is not "transportation" at all, but is a "commercial operation" and the Commission so found in the instant case (R. 48). In fact, an "in-transit privilege" is just the opposite of "transit" or transportation which carriers are required to furnish. It is a privilege granted by carriers to shippers of interrupting the actual transit or transportation of a shipment at a point designated by the shipper, who takes the shipment in his custody and holds it for periods as long as 12 months for the purpose of storing, processing, milling, or other such "commercial operations" and later reshipment at the balance of through rates as if there had been no interruption to the continuous through movement of the shipment. This has been called by this Court "the fiction of a through rate with transit privilege", *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 777.

As a "transit privilege" is held, by the Commission and the courts, *B. & O. R. Co. v. U. S.*, 305 U. S. 507, 525-526, to be a "commercial operation" and not transportation which carriers are required by the Act to furnish, plainly such commercial operations cannot be made the basis of an order requiring through routes and joint rates that short haul existing routes, nor the basis of an order, as in this case, equalizing rates on different routes so that transit privileges may be available at equal rates on both routes.

Moreover, a "transit privilege" is "a matter local to the railroad, on which the transit point is situated." "Whether the privilege shall be granted or withheld is determined by the local carrier", and the Commission is without power by the indirect process of ordering through routes or joint rates to require a carrier to establish or offer transit privileges on its line, to say nothing of ordering the Union Pacific to short haul itself by joining in through routes and joint rates for the purpose of utilizing at equal rates the transit privileges offered by the Rio Grande. *Central R. R. Co. v. United States*, 257 U. S. 247, 255-256.

The district court cited *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588 (affirming 54 F. Supp. 381), in support of its view that the Commission has power to order short hauling through routes and joint rates for the purpose of making transit privileges available at points on the new route ordered (R. 161). But the decision in that case is clearly inapposite. The order there was on complaint of a shipper, Stickell, whose plant was located on the Pennsylvania Railroad at Hagerstown, Maryland. He already had ample transit privileges but he objected to the time consumed in transporting his grain by the route over which the Pennsylvania insisted upon moving his shipments in order to retain its long haul. The case did not involve the question of establishing a new through route so that shipments could receive transit operations at points on a railroad other than the Pennsylvania. Stickell wanted routes that would avoid a back haul and save transit time, enabling him to operate on a more equal basis with his competitors. In short, he wanted better and faster transportation and not, as the Commission here orders, slower transportation over a longer and more onerous route.

The through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing ~~90~~ cents per ton, and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in from 200 miles to 50 per cent more miles of additional transportation over the most "onerous" operating conditions of any western railroad, adding \$124 per car to transportation cost, two additional interchanges between carriers at an additional cost of \$20.44 per car per interchange, and at least one or two days' more time in transit, and would short haul existing routes at least 925 miles, and would deprive some of the appellant railroads of their entire hauls (R. 41).

7. The district court erred in holding that the Commission may lawfully order through routes and joint rates under Section 15(3) and (4) to remedy rates found unreasonable under Section 1, and "for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act."

The Commission concluded that the combination rates via the Rio Grande on the commodities specified in the order are and for the future will be "unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes", and that maintenance by Union Pacific and other railroads of joint rates on the traffic involved with the ~~Sumberger~~ ~~Railroad~~ at points between Ogden and Salt Lake City while refusing to participate in like rates with the Rio Grande at the same points "subjects the Rio Grande to discrimination in violation of section 3(4) of the act" (R. 73-74).

To remedy the violations so found of Section 1(5) and Section 3(1) and (4), the order requires establishment of through routes in connection with the Rio Grande for the specified commodities and "joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming" (V. II, 1596).

Although the order further requires the carriers to "cease and desist" from publishing and demanding rates in excess of those prescribed and from practicing undue prejudice and preference and unlawful discrimination and to maintain and apply rates which will prevent and avoid undue prejudice and preference and unlawful discrimination, it is apparent that to remedy all of the violations so found the Commission seized upon its powers to prescribe through routes and joint rates under Section 15(3) and (4). This is made clear by the Commission's own statement (R. 33) that any order requiring establishment of through routes and joint rates in connection with the Rio Grande must be grounded upon the provision in Section 15 that such routes are necessary and desirable in the public interest and are "needed in order to provide adequate and more efficient or more economic transportation".

(While the district court held that there was no evidence to support the Commission's finding of undue preference and prejudice in violation of Section 3(1), it held that the order (as modified and restricted by the court) "is valid under Secs. 1, 15(3) and 15(4) of the Act" and that the order is valid "for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act" (R. 167, 168).

Thus, the court expressly sustains the Commission's prescription of through routes and joint rates to remedy violations of Sections 1(5) and 3(4) of the Act, and in doing so we submit that the court was plainly in error.

The Rio Grande's complaint to the Commission alleged that the combination rates were unreasonable, unduly prejudicial and preferential, and the Commission so found. The Commission has direct power to remedy violations of Sections 1 and 3 of the Act but it could not, by using that direct power, require the exact equalization of rates demanded by the Rio Grande, *Thompson v. United States*, 343 U. S. 549. Seizing upon its through route powers, the Commission "sought to accomplish by indirection" what it could not accomplish by using its direct powers to remedy violations of Sections 1 and 3 of the Act, *Central R. R. Co. v. United States*, 257 U. S. 247, 257.

That the real and ultimate purpose in ordering the through routes and equal joint rates is to satisfy the Rio Grande's demand that the specified commodities pass through points on that line en route to destinations in the eastern and southern part of the country at exactly the same rates and charges which apply via the Union Pacific, is shown by the report where it is said:

"For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply." (R. 70)

The Rio Grande has no right to demand that traffic en route, for example, from Portland, Oregon, to New

York, N. Y., pass through points on its line, nor may the Commission, upon such demand by the Rio Grande, order a through route for that purpose for it is prohibited by Section 15(4) from requiring a through route to help a carrier financially, and "there is no express requirement of law that routes must pass through particular intermediate points," *Pennsylvania R. Co. v. United States*, 54 F. Supp. 381, 392, affirmed, 323 U. S. 588. As this is the Rio Grande's complaint and not that of a shipper, the Commission has acted arbitrarily and erroneously in ordering that the traffic pass through points on the Rio Grande.

In order to divert the traffic to its line, the Rio Grande demanded and the Commission has given it an exact equalization of rates with the rates on the specified commodities via the Union Pacific through Wyoming. That this was the only thing sought by the Rio Grande and that the Commission invoked its through route powers to accomplish that result clearly appears from the following language of the report (R. 28-29).

"Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15(3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest."

The Commission's power to require a reduction in rates found unreasonable is conferred by Section 15(1) of the Act. It was that power which the Rio Grande asked the Commission to invoke to equalize its rates via Union Pacific routes. But, while the instant case was pending decision before the Commission, this Court on June 2, 1952, held that the Commission's power under Section 15(1) to determine and prescribe reasonable rates could not be used to equalize rates on different routes or to defeat the requirement of Section 15(3) and (4) of the Act, *Thompson v. United States*, 343 U. S. 549. In that case, the Commission ordered local grain rates of the Missouri Pacific and the Burlington railroads from Lenora, Kansas, via Concordia, Kansas, to Omaha, reduced to the extent that those rates exceeded rates on grain from the same origins via the Missouri Pacific to Kansas City. This would, on traffic from Lenora to Omaha, short haul the Missouri Pacific from Concordia to Omaha. Through routes and joint rates had not been published to Omaha, but the Commission held that through routes between the Missouri Pacific and the Burlington from Lenora to Omaha already existed because their tracks connected at Concordia and that, therefore, it was not required to make findings under Section 15(3) as limited by paragraph (4) of that section. Shippers could use the route via the Missouri Pacific and Burlington if they elected to pay the higher combination rates in effect over such routes. *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I. C. C. 519, 523. This Court enjoined and annulled the Commission's order because it "in effect, establishes a new through route without complying with the requirements of Section 15(3) and (4) of the Act," (p. 554). At pages 559-560 the Court said:

... * * the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any

route between two points by ordering reduction of the sum of the local rates over that route. Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order. The Commission by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4), before the Court in *United States v. Great Northern R. Co.*, 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage.

Faced with this decision, and being prevented by it from using its rate-reducing power to require exact equalization of rates via the Rio Grande with those via Union Pacific routes and thus "in effect," establishing a new through route, the Commission turned to its through routes authority under Section 15(3) and (4) to compel the reduction in the Rio Grande's combination rates and to equalize them with rates via Union Pacific routes.

Section 15(3) and (4) confers no power upon the Commission to require rate reductions or to equalize rates via different routes. Those provisions, as noted above, do not concern the reasonableness or unreasonableness, *per se*, of rates. They are concerned with public and shipper "need" for through routes which railroads have not voluntarily established. In other words, those provisions concern the adequacy, efficiency and economy of transportation routes, services and facilities. Where, as in the instant case, only a reduction or equal-

ization in rates is sought, Section 15(3) and (4) are not available and provide no power in the Commission to accomplish the sought reduction or equalization.

While Section 15(3) empowers the Commission, after finding a new through route is "necessary or desirable in the public interest" to establish joint rates "or the maxima or minima, or maxima and minima, to be charged" over the new through route, it does not authorize the Commission to compel a rate reduction via one route to equalize rates maintained over other routes.

Nor may the Commission invoke its through route and joint rate powers to prescribe the exact remedy it wants for a violation of Section 3 of the Act. The remedy for a violation of that section is an order to "cease and desist" from the unlawful practice. Such order must leave to the carriers "discretion to determine how the discrimination should be removed," *American Express Co. v. Caldwell*, 244 U. S. 617, 625. In *Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, at page 650, this Court held:

"Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. Compare *American Express Co. v. Caldwell*, 244 U. S. 617, 624; *United States v. Penna. R. Co.*, 266 U. S. 191; *Chicago, I. & L. Ry. Co. v. United States*, 270 U. S. 287, 292; *Minneapolis & St. L. R. Co. v. Peoria & Pekin U. R. Co.*, 270 U. S. 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative.

"The principle has been approved in decisions of this court with respect to practices. *Interstate Commerce Comm'n v. Duffenbaugh*, 222 U. S. 42; *Central Railroad of New Jersey v. United States*, 257 U. S. 247, and rates, *East Tenn. V. & G. Ry. Co. v. Interstate Commerce Comm'n*, 181 U. S. 1; *Penn. Rv.*

fining Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 221."

Where, as here, Congress has provided direct remedies for violations of Sections 1 and 3, the Commission may not resort to its through route powers under Section 15(3) and (4) to prescribe the exact remedy it wants. *Central R. R. Co. v. United States*, 257 U. S. 247, 258.

The "alternative order" principle of the Court decisions has been championed and consistently adhered to by the Commission. *Fort Smith & W. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 216 I. C. C. 414, 433; *Quannah, A. & P. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 205 I. C. C. 253, 261; *Nicholson Universal S. S. Co. v. Pennsylvania R. Co.*, 203 I. C. C. 637, 647.

Counsel for the Rio Grande has contended in this proceeding that the "alternative order" principle laid down in the cited cases has been overruled or modified by *State of New York v. United States*, 331 U. S. 284, and *Ayrshire Corp. v. United States*, 335 U. S. 573. The contention is based on a misunderstanding or misstatement of those cases. The limited power to require through routes and joint rates was not involved in either of those cases. Neither of those cases involved the intermingling and alternative use of different provisions of the Act and powers thereunder to find first a violation of one provision and then to seize upon another provision to prescribe the remedy most suitable to the Commission. Neither of the decisions may be construed as holding that the Commission may use its through routes powers under Section 15(3) and (4) to require the remedy it would like to impose for a violation of Section 1 or Section 3.

The "alternative" order principle is not a mere academic matter—it is a right of great benefit to carriers ordered to "cease and desist" from violations of Section 3. In the instant case, to cure undue prejudice to shippers, and depart from the Commission's erroneous conclusion that "the same" rates must apply over the longer and "more onerous" Rio Grande routes as over the Union Pacific's shorter and more efficient routes, rates could be equalized over the two routes by reducing the Rio Grande's combination rates, or by raising the rates of the Union Pacific routes, or by altering both the combination rates and the joint rates to the point where an exact equality is reached. Raising the joint rates via Union Pacific routes would be particularly just and appropriate in this case because, as the report shows, the joint rates are subnormal, depressed rates resulting from water, truck and other competitive forces, and are too low to be spread over the longer and "more onerous" Rio Grande route (R. 67).

By its commingling and confusion of its powers, and its unexplained and inexcusable departure from the settled "alternative order" principle which it has long championed, the Commission would, by resorting to its through route powers, deprive the appellants and other railroads of any chance to preserve their revenues or safeguard their earning capacity, as they have a right to do, *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277, or to prevent or offset, by increasing the joint rates via the Union Pacific routes, the revenue losses which they will most certainly suffer if they are to be short hauled as permitted by the order.

The Commission's commingling of separate and independent sections of the Act and its use of its through

routes and joint rates powers to effect the exact equalization of the Rio Grande's rates with those of Union Pacific routes has not only confused and led the majority of the district court into the error pointed out above, but has also confused and misled counsel for the Government and the Rio Grande into the error of suggesting that the order requiring through routes and joint rates can be sustained upon the Commission's findings of unreasonable rates in violation of Section 1(5) and undue prejudice and preference in violation of Section 3(1). At page 10 of the Government's jurisdictional statement (No. 119) it is asserted that:

"An independent basis of the Commission's order establishing through routes was its finding that the combination rates between the Union Pacific and the Rio Grande were, to the extent that they exceeded the joint rates via the Union Pacific routes to the same points, unjust and unreasonable and unduly prejudicial of shippers and receivers using the Rio Grande, and unduly preferential of shippers and receivers using the Union Pacific routes, in violation of Section 3(1) of the Act."

The Rio Grande's jurisdictional statement states at pages 12 and 13 that the short-haul prohibition of Section 15(4) does not apply "[w]here discrimination and undue prejudice is found under Section 3 of the Interstate Commerce Act."

Thus, counsel for both the Government and the Rio Grande ask the Court in this case to do the very thing it refused to do in *Securities Comm'n v. Chenery Corp.*, *supra*, namely, to sustain the validity of the order upon grounds or standards other than those of Section 15(4)(b) which the Commission expressly and avowedly invoked. While we demonstrate elsewhere in this brief that find-

ings of a violation of Section 3 afford no basis for compelling through routes and joint rates that short haul existing routes, the point here is that even if the Commission could order through routes upon findings under Section 3, it did not purport to do so in this case but instead expressly declared that in ordering through routes and joint rates it was acting upon the authority, standards and requirements of Section 15(4)(b). "Since the decision of the Commission was explicitly based upon the applicability of" those standards and requirements "its validity must likewise be judged on that basis", first *Chenery* case, 318 U. S. 80, page 87.

The Commission having departed from, misapplied and failed to meet the requirements of the standards it explicitly invoked, this Court will not attempt to sustain the order by searching for or spelling out a different or "a more adequate or proper basis" for it, second *Chenery* case, 332 U. S. 194, page 196; *Florida v. United States*, 282 U. S. 194, 215; *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

Neither Section 1 nor Section 3 authorizes the Commission to order through routes and joint rates. The provisions of those Sections concern the reasonableness of carriers' charges for hauling freight and the fairness or equality to shippers by a carrier or carriers when shippers' circumstances are substantially similar. The specific purposes ~~of those~~ provisions, as noted elsewhere in this brief, bear no relationship to the adequacy and efficiency of transportation facilities and service or other circumstances which constitute the power to require through routes and joint rates. If, as the majority of the district court held and counsel for the Government and the Rio Grande now urge, a finding of a violation of either or both sections 1 and 3 may serve as the basis

or an independent or secondary basis for an order requiring through routes and joint rates, then as said by this Court in *Thompson v. United States*, *supra*, page 560:

"* * * the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."

8. In condemning Union Pacific routes as "inadequate" because (1) they have lower rates and are "not available" at points served only by the Rio Grande, and (2) on the theory that shippers from the northwest area are "debarred" from effective participation in the marketing system for perishable products because they must pay higher rates when they ship via the Rio Grande than when they ship via the shorter, adequate and efficient Union Pacific routes, the Commission misconstrued and misapplied Section 15(4)(b) and departed without justification from the norms of its prior decisions.

The rule and norm of the Commission's prior decisions has been that the Act does not require it to order through routes and joint rates in all instances where carriers have refused to do so but empowers the Commission to order through routes and joint rates for the purpose of securing reasonable facilities to the public. In *New York Dock Ry. v. B. & O. R. R. Co.*, 32 I. C. C. 568, in dismissing a complaint of a railroad demanding joint rates to improve its financial position, the Commission said at page 575:

"* * * we cannot view with favor an effort to require the establishment of such routes and rates merely to enable a carrier to wrest from its connections, or an agent to wrest from its principal, greater compensation."

In *Lehigh Portland Cement Co. v. Lehigh Valley R. Co.*, 238 I. C. C. 199, the Commission said at page 201:

"The statute makes it the duty of common carriers subject to the act to establish through routes and just and reasonable rates applicable thereto. Where this duty has been fully met and discharged and there exists both such reasonable through routes and joint rates, and other routes by combination over which no joint through rates apply, the carriers in our opinion are not required to maintain a parity of rates over both such routes, but may properly maintain through joint rates over joint through routes that are somewhat less than the combination of locals used to make the through rates applicable over the combination through routes; provided that neither rate, under all the facts and circumstances, is more than just and reasonable for the service performed."

In *Kansas City Hay Dealers Asso. v. C. G. W. R. Co.*, 49 I. C. C. 372, the Commission said at page 377:

"To compel the application of short-line rates over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads against the interest of the public as a whole. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes adequate response is made to the reasonable requirements of the public, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes."

In the instant case the joint rates over existing through routes of the Union Pacific and its connections are neither unreasonable nor unduly prejudicial. In fact, they are expressly found by the Commission to be reasonable, and the direct routes over which they apply are found adequate to haul any foreseeable volume of traffic.

On the other hand, the combination rates via the indirect and longer Rio Grande routes are found both unreasonable and unduly prejudicial.

Keeping in mind that the proceeding before the Commission is an effort of the Rio Grande to enhance its financial position by the simple expedient of having the traffic move over its line instead of the Union Pacific and that the only difference that would result if the order becomes effective would be a rate reduction via the Rio Grande in the amount of the difference between its combination rates and the joint rates via the Union Pacific on whose route the shippers now have every privilege they would have on the Rio Grande, the following language of the Commission in *C. & C. Traction Co. v. B. & O. S. W. R. R. Co.*, 20 I. C. C. 486, 492, is very pertinent:

"* * * we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates. * * *"

Improvement of the Rio Grande's financial position and reductions in transportation costs of shippers are not measures of a carrier's duty to establish "reasonable through routes," required by Section 1(4) of the Act. In *Beaver Sand Co. v. Director General*, 66 I. C. C. 285, the Commission dismissed a complaint demanding through routes and joint rates, saying at page 289:

"In *C. & M. Elec. R. R. Co. v. Illinois Central R. R. Co.*, 13 I. C. C. 20, in discussing a suggestion that the then existing provision of the law with respect to the establishment of through routes and joint rates was mandatory, we said:

"We are unable to perceive the force of this suggestion. It proceeds apparently on the

theory that the sole object of the provision above quoted was to afford a means by which new lines, with the aid of the Commission, may profitably force their way into shipping districts built up and already well and adequately served by older lines, and thus seize and divide with the latter such traffic as may be offered for movement. If that be the import of the clause in question, it is too well concealed to be readily discernible.' * * *

In *Fort Smith & W. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 216 I. C. C. 411, at page 431, the Commission, in rejecting a contention of shippers supporting the railroads' complaint that partial-unloading privileges on that line in connection with transcontinental joint rates was needed to further economical distribution of canned goods and dried fruit, pointed to the depressed level of canned goods and dried fruit rates and said:

"While the establishment of the transit service on these commodities would result, in many instances, in a saving in transportation costs to these shippers, such saving which would be at the expense of the carriers cannot be said to be a commercial necessity."

In short, the rule and norm of the Commission's prior decisions has been consistent with the statutory standard and requirement of Section 1(4) that carriers shall establish "reasonable through routes" and with the rule laid down by this Court that "[t]he law exacts only what is reasonable from such carriers", *Midland Valley R. R. v. Barkley*, 276 U. S. 482, 485.

Decisions of the Commission, since enactment of clause "(b)" in 1940, summarized in *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, disavow any departure from the statutory standard and requirement of

"reasonable through routes". At pages 333-334 of the *Adrian* case, the Commission said:

"Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short haul one or more carriers have been prescribed. See *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333 (sustained in *Pennsylvania R. Co. v. United States*, 323 U. S. 588); *Allied Mills, Inc., of Virginia v. Alton R. Co.*, 272 I. C. C. 49; *California Milling Corp. v. Atchison, T. & S. F. Ry. Co.*, 269 I. C. C. 725 and 274 I. C. C. 120. In the first two of those proceedings it appeared that the routes required to be established eliminated expensive out-of-line hauls, and in the latter proceeding the routes required were shown to be shorter in many instances than those which had existed. In all of those proceedings the routes required were at least as economical, from the standpoint of the carriers as well as of the shippers, as were most of the existing routes.

"The instant situation differs. All of the routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation. In addition, because of the circumstances here present, we believe a requirement that the routes sought be established would not 'give reasonable preference' to the originating carrier."

In the instant case the Commission condemns Union Pacific routes as "inadequate", not because they are longer, inefficient or unable to haul any foreseeable volume of traffic, but because "at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply" (R. 70). And, in an apparent effort to justify short-hauling Union Pacific routes, the Commission asserts that shippers of perishable products from the northwest

area "are debarred" from effective participation in the marketing system for such products; obviously for the sole reason that, although those shippers have available a multitude of Union Pacific routes at lower rates, they must pay higher rates if they ship over the Rio Grande route.

Both reasons upon which the Commission thus attempts to condemn Union Pacific routes as inadequate are clearly based upon its assertion that perishable products require "as many routes as possible." Since Section 15(4)(b) clearly lays down the standard of "adequate" transportation and Section 1(4) requires only "reasonable through routes", it is plain that the Commission has grossly misinterpreted and misapplied the standards of both sections, in addition to departing from the rule and norm of its prior decisions. Circuit Judge Johnsen's dissenting opinion aptly appraises this phase of the Commission's report as follows:

"The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them from effective participation in the widespread system developed for the marketing of such commodities. In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' because otherwise they will be 'debarred from effective participation in * * * the marketing of such commodities.' * * * (R. 171)

"Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further such new route can be declared to provide 'more economic transportation,' because, by placing joint rates in effect the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15(4) entirely, as affording them any protection whatsoever against deprivation of their long hauls." (R. 172-173).

It may not be gainsaid that if the Commission may short haul Union Pacific routes either because they are "not available" at points served only by the Rio Grande or on the theory that shippers are "debarred" from effective participation in markets simply because they must pay higher rates when they ship via the Rio Grande to eastern and southeastern markets, then the Commission has at last invented an interpretation of the short-haul prohibition of Section 15(4) and the exceptions thereto which accomplishes the complete deletion of the short-haul prohibition as effectively as if it had succeeded in persuading Congress to repeal that prohibition. *Thompson v. United States*, 343 U. S. 549, 555.

III.

The District Court Erred in Refusing to Hold That the Entire Order is Void Because the Basic Facts Found by the Commission Contradict and are Inconsistent With its Conclusions, and Afford no Rational or Valid Basis for the Ultimate Conclusions and Order; and Because the Commission did not Make Findings Essential to the Validity of the Order.

Tested by the rule that the Commission's report must set forth a logical and rational basis for the order, *Miss. Valley Barge Co. v. U. S.*, 292 U. S. 282, 287; *Sec'y of Agriculture v. United States*, 347 U. S. 645, 654, examination of the inconsistent, contradictory and irrational conclusions in the report will demonstrate that the report and order here are far more vulnerable than the Commission's order which this Court enjoined in *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, saying at page 511:

"We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

It is found in the Commission's report that articles of the perishable and semi-perishable nature named in the order must be moved to markets "with expedition and care" (R. 70); that Union Pacific routes are as much as 50 per cent shorter than Rio Grande routes (R. 71); that facilities of Union Pacific routes "are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future"; that Union Pacific has surplus capacity, is efficiently operated (R. 62) and furnishes as good service as any that could be provided by the Rio Grande (R. 70); that the Rio Grande is

"less favorably situated" than the Union Pacific (R. 62); that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein" (R. 70); and that traffic routed over the Rio Grande as a bridge line would require at least 24 hours more time in transit than when routed over the Union Pacific, and would require one or two more terminal yard services (R. 62).

To borrow a word from the court's decision in *Watson Bros. Transp. Co. v. United States*, 59 F. Supp. 762, 778, one who reads and understands those findings of fact from the standpoint of adequate, efficient and economic transportation must be "scandalized" upon reading the Commission's conclusions that Union Pacific routes are "inadequate" for transporting the perishable articles named in the order from the northwest area to eastern points and that through routes and joint rates via the longer, slower and "more onerous" Rio Grande are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for those articles which "must be moved to market with expedition and care." In short, "the facts found do not, as a matter of law, support the order made", *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91.

Despite the fact found in the report that the Union Pacific's direct single line between McCammon, Idaho, and Omaha, for example, is 219 miles shorter than the Rio Grande route, at least 24 hours faster in transit time, and would require no interchange with other lines, the order would short haul the Union Pacific 925 miles so that the traffic may move via the longer and slower Rio Grande line, leaving the Union Pacific a haul of 111 miles from McCammon to Ogden in lieu of the direct single

line haul of 1,036 miles from McCammon to Omaha (R. 40).

Despite the fact that the purpose of Congress in adding clause "(b)" to Section 15(4) in 1940 was to accord shippers the benefits of shorter and more efficient through routes than routes that give carriers their long haul, the Commission here uses the power granted by clause "(b)" to short haul the Union Pacific's shorter, faster routes 925 miles, by requiring routes that are as much as 50 per cent longer via the Rio Grande's "less favorably situated" and "more onerous" line.

Although unable to find that public need for the Rio Grande route is sufficient to cause any of the traffic to move via that line except such as might move as result of "active solicitation" by the Rio Grande "to persuade" and to "induce" shippers to use its line as "an overhead or bridge route" and for "transit facilities" on that line, the Commission nevertheless finds it "necessary and desirable in the public interest in order to provide adequate and more economic transportation," that the Union Pacific and other lines join in through routes and joint rates so as to permit the Rio Grande to solicit, persuade and induce shippers to divert traffic and revenues from the shorter and faster Union Pacific routes to the Rio Grande's longer and slower route. And this incongruous conclusion is reached in the face of the Commission's settled administrative ruling that "[s]hippers who have to be importuned to use a railroad have no urgent need for it," *Tonopah & T. R. Co., Abandonment*, 240 I. C. C. 145, 149; citing *Mississippi Valley Co. Abandonment*, 145 I. C. C. 289, 293; *Batesville S. W. R. Co. Abandonment*, 170 I. C. C. 269, 277; and *Seaboard Air Line Ry. Co. Abandonment*, 184 I. C. C. 575, wherein the Commission said at page 580:

"When urgent solicitation is required to hold traffic to the railroad at noncompetitive points, it is apparent that there is no substantial necessity for the line."

Regardless of the admission in the report that many examples were shown in computations, based on ~~cost~~ scales prepared by the Commission's own Bureau of Accounts and Cost Finding, that, for instance, on a carload of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of \$1.14 per 100 pounds via Union Pacific route, 1,597 miles, would yield a net profit of only \$1.97 per car, and a net loss of \$62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington, 1,809 miles (R. 67), the Commission erroneously asserts that there is no claim that any of the joint rates are below a minimum reasonable level and that they "must be regarded as reasonable rates" (R. 68).

The Rio Grande's complaint alleged that the combination of local rates via its line and the lines of the defendants named in its complaint to and from the northwest area were unreasonable and discriminatory in violation of Sections 1 and 3 of the Act. It alleged that maintenance by the Union Pacific and certain other railroads of joint rates for the traffic in question, while refusing to establish the same joint rates with the Rio Grande, discriminated against the Rio Grande in violation of Section 3 of the Act. It did not allege that its rates were unduly prejudicial or preferential as between shippers.

The Commission finds that because of dissimilarities in transportation conditions on the Rio Grande's "more onerous" line compared with conditions on the Union Pa-

cific, the evidence fails to prove discrimination against the Rio Grande, but, as pointed out by Circuit Judge Johnson, it brushes the dissimilarities aside for the purpose of finding undue prejudice against shippers who might desire to use the Rio Grande. It finds that the Rio Grande's combination rates are unreasonable in violation of Section 1, and unduly prejudicial to shippers using the Rio Grande, and preferential of shippers using Union Pacific routes in violation of Section 3 of the Act, but, incredibly, the order inflicts no punishment on the Rio Grande for maintaining unreasonable and unduly prejudicial rates but, would punish railroads named as defendants in the Rio Grande's complaint by requiring them to establish through routes and joint rates with the Rio Grande "the same" as their own joint rates, thus short-hauling themselves to permit diversion of the traffic and revenues from their lines to the Rio Grande. 2

Despite the fact that "the defendants named in the complaint" do not demand or collect rates that exceed their own joint rates for the transportation of the specified commodities, they are, nevertheless, ordered to cease, desist and abstain from publishing, demanding or collecting rates that exceed their own joint rates which they now demand and collect.

Regardless of the fact that the Commission has complete power under Section 15(1) to prescribe the reasonable rate to be charged in lieu of a rate found unreasonable, and to require a carrier found guilty of practicing undue prejudice and preference, to "cease and desist" from such practice, the Commission ignores those direct powers to remedy the violations found, and seizes upon its through route power under Section 15(3) and (4) to require the "defendants named in the complaint" to

remedy the Rio Grande's violations as well as their own by joining with it in through routes and joint rates which will enable that violator to increase its revenues and improve its financial position by diverting traffic and revenues from the other carriers.

Regardless of the fact that all of the shippers in the northwest area are located on Union Pacific routes, and all of them have exactly the same privilege and choice of routing over the Rio Grande at its higher rates or over the Union Pacific at lower rates, the Commission concludes that shippers "using, or desiring to use the Rio Grande" are unduly prejudiced when they use the Rio Grande because the Union Pacific routes with lower rates are available to them; in other words, the shippers using the Rio Grande are found to be unduly prejudiced because they voluntarily choose that line instead of electing to route via the Union Pacific at lower rates.

Despite the undisputed testimony, not mentioned in the report, of the shippers in the northwest area, including those found to be unduly prejudiced as well as those unduly preferred, that they ship their commodities to markets in all 48 states and to Canada, South Pacific, South America, Cuba, South Africa and other foreign countries (V. I, 246), the Commission asserts (R. 70) that those shippers "are debarred from effective participation" in the marketing of their commodities, and this, merely because their shipments of potatoes, for example, can move from Idaho origins to Chicago over shorter mileage of Union Pacific routes in 24 hours less time and at lower rates than if moved via the Rio Grande.

Faced with the decision of this Court in *Thompson v. United States*, 343 U. S. 549, that the Commission could

not use its power to prescribe reasonable rates so as to equalize rates via two different routes and, thus, "in effect" establish through routes and joint rates, without complying with the requirements of Section 15(3) and (4), the Commission now seizes upon the through routes power to equalize rates which it could not do under its reasonable rate powers.

Faced with the holding of this Court in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 277, that "the purpose" of the prohibition against compelling through routes that short haul carrier, "is to protect the long haul routes of carriers," the Commission now seizes upon the 1940 clause "(b)" amendment to Section 15(4) as its authority to rearrange the railroads by chopping the Union Pacific in two and tying the separate pieces to the Rio Grande's line at Ogden and Denver to enable it to participate in the traffic and revenues.

Despite the fact that the Rio Grande's President testified that its sole purpose in filing the complaint was to increase its revenues and improve its financial position, and the fact that the order will accomplish this purpose, the Commission would evade and escape the provision in Section 15(4) that prohibits it from compelling through routes to aid a carrier financially, by the simple expedient of denying that in reaching its conclusions it gave any consideration to the Rio Grande's financial needs.

Regardless of the fact that the order requires "the same", and not lower, rates via the Rio Grande as the rates via Union Pacific routes, and the further facts shown by undisputed testimony that the average cost of hauling a carload of freight from Pocatello to the Missouri

River is \$124.33 greater via the longer Rio Grande route than via the Union Pacific, the Commission finds that the Rio Grande route is necessary to provide adequate and "more economic" transportation.

Despite the obvious and unalterable physical and geographical fact that towns and communities served exclusively by the Rio Grande are not located on Union Pacific routes, the Commission holds that Union Pacific routes are "inadequate" because they are "not available" at points on the Rio Grande (R. 70) for transit privileges which the Commission finds to be "commercial operations" (R. 48) and not transportation service.

The Commission correctly states (R. 72) that it cannot find discrimination against the Rio Grande because there is no evidence of record as to transportation conditions over the routes allegedly committing the discrimination, but despite the absence of such evidence, the Commission proceeds (R. 73-74) to find undue prejudice and preference between shippers even though such finding cannot be made without evidence showing that transportation conditions affecting both the alleged unduly prejudiced and preferred shippers are substantially similar. Not only is the finding of undue preference and prejudice among shippers precluded by the absence of evidence showing that transportation conditions affecting them are substantially similar, but it is also precluded by the Commission's own finding (R. 70) that transportation conditions on the Rio Grande are "more generous" than those on the lines of any of the other trans-continental railroads, and by the finding (R. 71) that the differences in transportation conditions are "substantial." Having thus found dissimilarities in transportation conditions, the Commission was under the plain

duty to make a finding that the evidence did not prove undue prejudice and preference between shippers, *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197.

Despite its findings that dissimilarities in transportation conditions resulting from the Rio Grande's longer and more onerous route must be given effect in rates for shorter hauls, but not for hauls of "great lengths" (R. 72), the order would give effect to those dissimilarities in hauls via the Rio Grande as long as 3,044 miles from Seattle, Wash., to Sault Ste. Marie, Michigan, but would ignore the same dissimilarities and require equal joint rates via the Rio Grande in hauls, for example, from Brigham City, Utah, to Omaha, 1187 miles, to Kansas City, 1267 miles, to St. Joseph, Missouri, 1269 miles, and many other hauls that are far shorter than many of the hauls in which the order gives effect to the dissimilarities by not requiring rate reductions.

Although the report states (R. 70) that "adequate transportation facilities and services are required for the proper functioning of the system" which has been evolved for orderly distribution of perishable food products, it contains no finding that physical transportation facilities of Union Pacific routes are incapable of hauling efficiently and economically the articles specified in the order between the originating area and points in the southern and eastern part of the country; on the contrary, the report finds (R. 62) that transportation facilities of Union Pacific routes "are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future."

Although the report states (R. 70) that perishable articles require a number of services, "not only at origin

and destination, but en route, which are not usually required in the movement of ordinary traffic," it refrains from disclosing in that connection the fact that all of such services such as reconsignment, refrigeration and transit privileges are available at lower rates on the shorter Union Pacific routes.

The report shows that (R. 70) all of the "in-transit privileges and services" are now available at points on the Rio Grande, and as there is no finding that any new or additional privileges or services will be made available at origins or destinations or en route via the Rio Grande between the northwest area and points in the southern and eastern part of the country, it results that so far as shippers are concerned, the only effect of the order is a reduction in the Rio Grande's rates to equalize them with rates via Union Pacific routes.

We submit that the findings made by the Commission not only fail to support or furnish a rational basis for the order but that they compel the conclusion that Union Pacific routes provide adequate, efficient and economic transportation service for the traffic, including the commodities specified in the order, between points in the northwest and points in the eastern and southern parts of the country and that less adequate, less efficient, and less economic service would be provided by the Rio Grande.

Indeed, every fact stated and found in the report (apart from mere unfounded assertions made as conclusions) with respect to the Union Pacific routes, leads logically and rationally to the dismissal of the Rio

Grande's complaint. Not one fact stated or found with respect to the Rio Grande could possibly lead to the conclusion that its line is necessary to provide adequate and more efficient or more economic transportation of the traffic it seeks.

In addition, the Commission did not make findings of fact that are essential and would naturally be expected on the subject of the necessity of adding the Rio Grande's longer routes to existing routes which the Commission finds adequate to haul the present volume of traffic and any additional volume that might be offered in the foreseeable future. In *F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86, 97, this Court said that findings of the Commission "must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it." The basic findings must be of such nature that the ultimate conclusion or finding in the language of the statute will logically flow and be inferred from them. The findings of fact must be "logically related" to the ultimate conclusion on which the order rests; *Tri-State Broadcasting Co. v. Federal C. Com'n*, 96 F. (2d) 564, 567, in which the United States Court of Appeals for the District of Columbia held at page 568:

"The findings of basic fact which would naturally be expected on the subject of need of an additional station where a community already has radio service would be those concerning the adequacy of the existing service, and in particular in this case concerning the adequacy of the service of the primary stations KTSM and WDAH. The existing radio service might be inadequate in financial stability, equipment, or management; or it might be adequate in such respects and still be inadequate in the sense that the stations, although operating at full capacity, are unable to supply the demands of advertisers and

performers in the community. The Statement of Facts and Grounds for Decision on the part of the Commission contains no finding that the existing service is inadequate in any such particulars as are above mentioned. If there is evidence in the record warranting finding of inadequacy of the present service the Commission should make and state such findings. It was the intention of Congress in requiring findings of fact that the Commission should disclose the facts which cause it to reach its decision, and that it should not reach a decision without facts."

As noted earlier, the report says (R. 33) the order must be "grounded" upon findings required by Section 15(3) and (4) that the routes sought are "necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation". But the Commission has not made this essential jurisdictional finding. Instead, it finds merely that the Rio Grande route is necessary and desirable in the public interest "in order to provide adequate and more economic transportation." It is not found that the route is "needed" or that it will provide "more efficient" transportation.

There is no finding that diverting the traffic and revenues from Union Pacific routes to the Rio Grande "would serve some beneficial purpose such as maintaining good service and improving it," *F. C. C. v. RCA Communications, Inc., supra*, p. 97.

It is not found or stated in the report that the Rio Grande has surplus capacity or ability to haul any additional volume of traffic or that it is efficiently operated, or furnishes good or satisfactory service.

There is no finding that inclusion of the Rio Grande for a "bridge" haul in the through transportation will gen-

erate new or additional traffic, and the report shows that it would merely redistribute present traffic and revenues.

There is no finding that the over-all transportation system or those using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line.

There is and could be no finding that the order will give shippers lower rates than they now have via Union Pacific routes, for, the purpose and requirement of the order is merely to make the Rio Grande's rates "the same" as those of Union Pacific routes.

There are no findings of basic fact on the questions whether the combination rates via the Rio Grande are unreasonable or whether the joint rates of Union Pacific routes are reasonable for application via the longer and more onerous Rio Grande routes.

There are no basic findings of fact to show how or in what manner shippers from the northwest area are unduly prejudiced if they elect to use the Rio Grande with its higher rates instead of Union Pacific routes which those same shippers now use at lower rates for the through traffic.

The order will aid the Rio Grande financially but will be detrimental to carriers participating in the Union Pacific routes, for every dollar the Rio Grande gains will be lost by the Union Pacific and other carriers participating in the present routes.

Diverting the traffic to the Rio Grande will slow up rather than speed up its movement.

There is no finding that present transportation facilities in the northwest area, or between that area and the eastern and southern part of the country are insufficient or incapable of moving all of the traffic, including the commodities specified in the order, as promptly and expeditiously as it could move via the Rio Grande; on the contrary, the report shows there are abundant facilities of several railroads in active competition in the northwest area that are hauling and could haul any foreseeable volume of traffic between that area and the east and south, faster, over shorter routes and at lower rates than the Rio Grande.

There is no finding that present transportation service of carriers that would lose the traffic and revenues could be maintained, or that the over-all service would be improved or that the general public would benefit by diverting the traffic to the Rio Grande.

There is no finding that the Rio Grande will contribute additional facilities in the northwest or in the east or south—indeed, the report finds that the Rio Grande wants to divert the traffic merely for a “bridge” haul over its line between Ogden and Denver.

There is no finding that any complaint has been made by shippers against the service rendered by Union Pacific routes, and the record shows that no such complaints have been made since those routes were established some 50 years ago.

There is no finding that anticipated future developments in the northwest area may reasonably require additional transportation facilities, and if there were, the order would not alleviate that situation, for the Rio Grande proposes, and the order requires merely that the

traffic be diverted to the Rio Grande for a haul over its longer line en route from or to the northwest area.

The facts found by the Commission and those it did not, and could not, find in this case presents a situation similar to that in which this Court in *F. C. C. v. RCA Communications*, 346 U. S. 86, declined to approve an order of that commission authorizing an additional radio-telegraph circuit to compete with existing circuits. The basic and underlying facts found by that commission in that case were almost identical in substance to the facts found in the instant case. In that case, as in this, there was no finding that the competition of the additional circuit would be of benefit to the public. The Court remanded the case to give that commission an opportunity to determine, if it could, from the evidence whether the competition of the additional radio-telegraph circuit "would serve some beneficial purpose such as maintaining good service and improving it." Mr. Justice Douglas agreed that such finding, "measured by the public interest" was necessary to justify the order, but dissented from the remand and held that the order should be set aside because the facts of record "are so unequivocal that there is no apparent way for the Commission to meet the standard approved both here and below." At page 99, he summarized those facts as follows:

"* * *—existing facilities are in excess of those required to handle present and expected traffic;

"—the proposed operations will redistribute present traffic rather than generate new traffic;

"—the proposed service will not lower rates nor speed up transmission nor improve the existing service in any respect;

"—the proposed service will aid Mackay financially and be detrimental to RCA.

"—this is a field where, without the proposed service there is active competition and an excess of facilities to meet present or expected needs."

Keeping in mind that the question here is whether there is a "need", for example, for a carload of potatoes shipped from a station on the Union Pacific in Idaho to New York to move via the longer line of the Rio Grande between Ogden and Denver instead of moving over the Union Pacific's 219-mile shorter, direct single line to the Missouri River, and observing the Commission's finding (R. 62) that the Union Pacific has lower rates and is "adequate to move over its own ~~direct~~ routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future," we submit that it is wholly illogical, irrational and a mere "artificial use of words" for the Commission to assert that Union Pacific routes for the commodities named in the order are "inadequate and less economical than are the Rio Grande routes." This assertion becomes even more irrational when we observe the Commission's finding (R. 70) that the perishable commodities named in the order "must be moved to market with expedition and care," and the further finding (R. 62) that "bridge" traffic moved over the Rio Grande en route to eastern destinations "would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services."

The Report will be searched in vain for any finding or statement of fact which could possibly justify the conclusion (R. 70) that Union Pacific routes "are inadequate and less economical than are the Rio Grande routes." Having correctly held (R. 69) that the Rio Grande route could not be required "unless the existing

routes can be found not to provide "adequate" transportation," and (R. 62) that facilities of Union Pacific routes "are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future," the Commission, in its desperation, condemns the Union Pacific routes as "inadequate" simply by saying (R. 70) that they "are not available, and higher rates apply" at points on the Rio Grande for shipments reconsigned or accorded "transit privileges" at such points on that line. If such reasoning were sound, the Rio Grande route should also be condemned because it is "not available" at points on the lines of the Union Pacific or other railroads. Indeed, upon that theory, all through routes in the country are "inadequate" and therefore may be short hauled because they are "not available" at points not located upon them.

Nor is the fact that "higher rates apply" via the Rio Grande a logical or rational basis for condemning the Union Pacific routes as "inadequate." Where, as here, existing routes are shorter in both mileage and in "running time," are capable of hauling all of the traffic offered and no fault can be found with the transportation service they perform, a mere "declaration" by the Commission that such routes are "inadequate" is "an artificial use of words" and will not justify an order requiring an additional short-hauling route, *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545.

The order clearly should be enjoined and annulled in its entirety because the findings made by the Commission do not, as a matter of law, support the order or afford any rational basis for it, and because the Commission did not and could not make findings essential to the validity of the order.

IV.

The District Court Erred in Refusing to Enjoin the Entire Order Because the Commission's Ultimate Findings and Conclusions and the Order are not Supported by the Evidence and are Contrary to the Overwhelming Preponderance of the Evidence.

1. The evidence on which the Commission based its conclusions and order is without credibility or probative force, and affords no support for the order, because it was admittedly solicited and procured by the Rio Grande to help it win its case.

As shown in the Commission's report (R. 35-36), there have never been any through routes and joint rates between the Union Pacific and other railroads with the Rio Grande via Ogden and Denver on the traffic to and from the northwest area except during a short period beginning in 1897 when the Union Pacific, Oregon Short Line Railway Company and the Oregon-Washington Railroad & Navigation Company were in separate receiverships. After these receiverships ended, the joint rates with the Oregon Short Line Railway Company were cancelled in 1906, and those with the Oregon-Washington Railroad & Navigation Company were cancelled in 1912, with the approval of the Commission. *Lumber Rates, Oregon and Washington to Eastern Ports*, 29 I. C. C. 609, 31 I. C. C. 191; *The Ogden Gateway Case*, 35 I. C. C. 131.

In the 40-year period since the joint rates were cancelled no shipper or any representative of the public has filed with the Commission or any of the state commissions any complaint, request or demand for the through routes and joint rates sought by the Rio Grande. In other words, there has been a complete absence of any manifestation of shipper or public interest in the objective sought by the Rio Grande to divert traffic to its longer, slower

and more onerous route from the shorter, faster and direct route of the Union Pacific and connecting lines over which the traffic moves (V. I, 766-784; V. II, 913-999; 1181-1199; 1318-1331).

Realizing that it had no legal right to demand that the Union Pacific and other railroads join in through routes and joint rates via its line, and that such routes and joint rates could be compelled only upon a showing that they are "in the public interest", the Rio Grande contrived to gain its objective by pleading public interest in its complaint and by soliciting and procuring testimony of shipper and other public witnesses so as to help it win its case.

After thus intermingling and confusing its financial objective with rights of shippers and the public, the Rio Grande planned and executed a most vigorous and vicious campaign in an effort to stimulate and create an interest in its undertaking among shippers and the general public, particularly in communities and areas served by the Union Pacific in the northwest in Idaho, Montana, Oregon and Washington, at some points almost 1,000 miles from any area served by the Rio Grande. This campaign was publicly launched immediately upon the filing of its complaint on August 1, 1949, and the fact that it was conducted for the purpose indicated is admitted by the President of the Rio Grande, by its counsel, and by stipulation in the record (V. I, 48, 61; V. II, 964). The fact thus admitted was also shown by the testimony of numerous shippers, state commissions and others who were solicited by the Rio Grande to testify for it as public witnesses or not to testify against it.

In its campaign of agitation and solicitation to obtain witnesses so as to prosecute its complaint under the

guise and pretense of a public interest, the Rio Grande's representatives publicly condemned and vilified the Union Pacific, sought to persuade shippers and the public that they were suffering from "discriminatory freight rates of the Union Pacific," charged that shippers located on the Union Pacific were deprived of their right to select routes of their own choice, were denied access to markets, denied the use of transit privileges, denied a full supply of cars, and asserted that shippers would receive much better service from the Union Pacific if they would join with the Rio Grande pretending a public interest and testifying in such a way as to help it win its case. The Rio Grande charged the Union Pacific with a transportation "monopoly" in the northwest area despite the fact that a half dozen other railroads serve that territory and despite the fact that the Rio Grande did not and does not propose to perform any transportation service beyond the termini of its own present lines (original I. C. C. Ex. 30).

Finding itself unable to sustain the Rio Grande's case (R. 72, 33), the Commission turned to the testimony of shippers so solicited, procured and produced as witnesses by the Rio Grande in support of its complaint. The Commission's ultimate findings, conclusions and order are based entirely upon that testimony. Upon that testimony the Commission based its findings and conclusions that the through routes and joint rates required by the order are "necessary and desirable in the public interest, in order to provide adequate and economic transportation", as well as its findings that the combination rates via the Rio Grande are unduly prejudicial to shippers desiring to use the Rio Grande for the through traffic involved and unduly preferential of those same shippers when they route their traffic over the Union Pacific.

The Union Pacific contended before the Commission and the district court that testimony so procured by the Rio Grande in its efforts to prosecute its case under the guise of public interest, could legally be given no weight or probative effect, and that the Rio Grande's action and activities in soliciting, persuading and procuring witnesses to testify for it so as to help it win its case vitiated and nullified the proceeding, and called for dismissal of the complaint.

The Commission disposed of the contention by saying merely that both the Rio Grande and the Union Pacific sought to interest the public in their respective sides of the controversy and that there was no indication in the record that the witnesses admittedly persuaded and procured by the Rio Grande "had been stimulated in any questionable manner." The Commission seemed to think that the admitted solicitation and procurement of witnesses by the Rio Grande to help it win its case in the belief gained from the Rio Grande that they, too, would profit if the joint and collusive effort succeeded, is not "questionable" and does not destroy or detract from the weight, credibility or legal effect of that testimony. The majority of the district court merely said "[w]e do not find justification for serious consideration of that question" (R. 48, 165).

The courts of this country and the statutes of the land, and even the common law, have long since condemned and refused to tolerate the procurement of witnesses by a party to testify in such a way as to help him maintain and win his case. Even attempts to do so by any method are not only "improper" but also contrary to law. There is no "proper" method by which witnesses may be persuaded and procured to testify in such a way as to

help a party maintain and win his suit. The fact that the witnesses were "procured" is the vitiating circumstance. Such activities have been held to require courts to dismiss proceedings and refuse to become organs of perversion of justice, and that it is the duty of our tribunals to resist and strike down collusive and conniving contrivances in litigation, by refusing to lend their functions in such situations.

This intolerance of "procured" witnesses and proceedings in which such "procured" testimony is attempted to be used, has its basis in the ancient common law and more modern statutory law against champerty and maintenance.

Champerty and maintenance are defined in the Restatement of the Law of Contracts (Section 540(1) and (2)), as follows:

"'Maintenance' means the maintaining, supporting or promoting of litigation of another person.

"'Champerty' is the division of the proceeds of litigation between the owner of the litigated claim and a party supporting or enforcing the litigation."

In *United States v. Call*, 287 Fed. 520, the 5th Circuit Court of Appeals, page 521, says:

"Champerty is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it."

The following definitions are found in *Breedon v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 85 S. W. 930 (Mo.):

"Maintenance is one of the old actions at common law, the right of which exists to this day. Brad-

laugh v. Newdegate, 11 Q. B. Div. 1. It is defined as an 'officious intermeddling in a suit that no way belongs to one, by assisting either party, with money or otherwise, to prosecute or defend.' And it is said 'to be an offense against good morals, in that it keeps alive strife, and perverts the remedial powers of the law into an engine of oppression.' 5 Am. & Eng. Ency. of Law (2d Ed.) 815. The offense may be committed by stepping in after litigation has been begun, as by encouraging and aiding its origin. *Bradlaugh v. Newdegate*, 11 Q. B. Div. 9. Champerty is generally treated by text-writers in connection with maintenance, and it also is one of the old common-law actions which yet subsist. *Duke v. Harper*, 66 No. 51, 37 Am. Rep. 314. These old actions, though akin, are unlike in many particulars. The champertor has in view a profit to himself, in a share of the spoils of the litigation. The maintainer is more of a voluntary intermeddler, and stirrer up of strife for the love of it. He is described as an 'officious' intermeddler. In other words, he interferes where he has no business."

In *Casserleigh v. Wood*, 119 F. 308 (8th C. C. A.), the Court dismissed a suit in which both parties expected to profit by evidence "procured" by plaintiff to help win the case. The Court said the arrangement to procure witnesses was "opposed to public policy," and that (p. 315):

"We are also of opinion that, even if an action at law could be maintained for a breach of the contract, yet it is so far meretricious and tainted with illegality that a court of equity ought not to enforce it specifically."

It is enough if the understanding "savoured of the character of champerty," *Jamison Coal & Coke Co. v. Goltra*, 143 F. 2d 889, 895; and the courts will raise the question *sua sponte* when grounds to do so appear,

Curry v. Dahlberg, 110 S. W. 2d 742 (Sup. Ct. Mo.); *Barker v. Barker*, 14 Wis. 142; *Miles v. Mutual Reserve Fund Life Ass'n*, 84 N. W. 159, 164 (Sup. Ct. Wis.), holding that when a court discovers that a suit on trial before it is "tainted with champerty, a failure to refuse to proceed therein in effect makes such a court a party to the illegal transaction," and that a court should not "permit itself to become the organ or instrument of carrying out the champertous agreement, but it should repel the plaintiff and his suit."²⁹

We appreciate that the Commission is not a court. It has been called a "quasi-judicial" tribunal in some of

²⁹ *Quirk v. Muller* (14 Mont. 471), 36 Pac. 1077 (Supreme Court of Montana, 1894), appears to be one of the leading cases on the offense of procuring and suborning witnesses. At page 1078 the Supreme Court of Montana held:

"Indeed, the contract, brought down to a simple statement, is that plaintiff agreed, for a consideration to procure testimony that would win the lawsuit. He procured the testimony, and it won the suit. We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury; but the contract had the tendency and opened the very strong temptation to the procurement of perjury. Mr. Bishop says: 'The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts.' Bish. Cont. § 476."

Citing several cases, the Montana Supreme Court said at page 1080:

"We fully concur in the views expressed in these cases, and we are of opinion that the contract under consideration falls within the objectionable class. To be sure, under the contract the plaintiff, Quirk, may have performed only innocent acts, and there is nothing to indicate that both his intentions in making the contract and his acts in carrying it out were other than wholly innocent and lawful. But the contract was just such a one as to encourage an unlawful act. It invited subornation of perjury. It held out a large reward for success. * * * There is here too close an approach of the evil maxim, sometimes quoted: 'Get money; honestly, if you can; but get money.' The contractor in plaintiff's position could only too easily be led to say to his conscience: 'I will procure the necessary testimony; honestly, if I can; but I will procure the testimony.'"

its functions. It was none the less its duty under the law to hold that testimony so "procured" is without credibility or probative force, that the Rio Grande's deliberate procurement of the testimony vitiated and nullified the proceeding, and to demonstrate, by dismissing the complaint that the Commission will not, as said in *Miles v. Mutual Reserve Fund Life Ass'n*, 84 N. W. 159, 164, "permit itself to become the organ or instrument of carrying out" schemes and efforts to wrest a favorable decision from it, regardless of the lack of merit in the Rio Grande's own cause.

In a basically comparable situation, the Florida Railroad and Public Utilities Commission, on June 30, 1955, dismissed a proceeding³⁰ brought as the result of agitation, connivance and collusion between several parties with a view to profiting from refunds of electric rates they expected to prove had been excessive. In condemning as "champertous," the collusive activities which led to the filing of the complaint, the Florida Commission said:

"Another feature of a champertous contract that is boldly evident in this case and one of the features condemned by law is that in which a person, for his own selfish gain, and a stranger to the subject matter, stirs up strife and litigation by bringing a proceeding which a party in interest might not do if left to his own judgment and not induced by the fact that the litigation would be carried on at the expense of another for what he may acquire from the action maintained.

* * * * *

"It is not difficult to stir up and foment rate dissatisfaction when the intermeddler agrees to pay all costs incurred in bringing about a rate investigation on

30 "Order No. 2200, Docket No. 4046-EU, In Re: Complaint of various subscribers against Florida Power & Light Company seeking a reduction in electric rates and charges."

the promise that he will receive nothing more than a portion of any rebate or saving that may be obtained. If this scheme of developing rate investigations is recognized and encouraged, there will be no end to the investigations this commission will be called upon to conduct in order that such intermeddlers may remain in business."

2. The Commission's conclusion, on which the order rests, that the required through routes and joint rates "are necessary and desirable in the public interest, in order to provide adequate and more economic transportation" is based on (a) solicited and procured testimony that legally has no probative value, (b) is contrary to the overwhelming preponderance of the evidence, and (c) is the result of the Commission's arbitrary and biased treatment of the evidence.

While this Court has held that "the credibility of witnesses", and "conflicts in the testimony", are for the Commission, it has laid down the rule that "the legal effect of evidence is a question of law" and that an order of the Commission is void if "contrary to the 'indisputable character of the evidence,'" *Int. Comm. Comm. v. Louis. & Nash R. R.*, 227 U. S. 88, 91-92. The Court has held that whether an order is supported by "substantial" evidence is also a question of law; that "substantiality of evidence must take into account whatever in the record fairly detracts from its weight"; that an administrative tribunal's order must be set aside unless "justified by a fair estimate of the worth of the testimony of witnesses", and that, in resolving these questions, the courts must "consider the whole record" and determine whether the evidence is substantial "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed" to the administrative tribunal's decision. *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 488-490.

(a) The "indisputable character" of the testimony on which the order is based..

As shown above, the Commission expressly stated that any order requiring through routes and joint rates in this case "must be grounded upon findings, as specified in Section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation", but that such findings would not be "determinative" unless Union Pacific routes could be found not to provide "adequate" transportation (R. 69).

The Commission found that for the commodities named in the order, through routes and joint rates in connection with the Rio Grande are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (R. 73). Although not conforming to the standards and criteria expressly invoked by the Commission, as we have already demonstrated, the finding made is the legal basis on which the Commission says it pivots the order. The order thus purportedly rests upon the finding of "public interest", necessity and desirability for adequate and more economic transportation. Therefore, unless that finding is supported by substantial evidence, the order can not be sustained.

The only testimony mentioned by the Commission in attempting to support its order, and, in fact, the only "public" testimony of record that purported to advocate even the desirability of the through routes and joint rates ordered by the Commission, is that, discussed above, of some 50 shipper or "public" witnesses whose testimony the Rio Grande admitted it solicited and procured to be submitted so as to help it win its case.

Upon authorities cited above, we submit that the "indisputable character" of solicited and procured testimony as such, as a matter of law, as to deprive it of any credibility or probative force, and that, in basing its order upon that testimony the Commission has not only failed and refused to consider and give effect to the "indisputable character" of that testimony, but also to consider "whatever in the record fairly detracts from [the] weight" of such testimony, and failed to fairly estimate "the worth of the testimony of witnesses" solicited and procured by the Rio Grande to help it win its case.

In these circumstances, without more, the order is void because it lacks support not merely of "substantial" evidence, but of any evidence that could legally have any weight, credibility or probative force.

But even if the testimony on which the order rests had not been solicited and procured by the Rio Grande, it is so lacking in substance and probative force that it does not begin to establish the criteria of Section 15(4)(b) which the Commission invoked as the legal basis of the order. In the first place, the Commission frankly and correctly concedes that:

"There is no contention here by complainant [Rio Grande] that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect." (R. 69)

Undaunted by that fact, and still pursuing its ancient determination to evade completely or limit "the impact of the short-hauling restriction on its power to establish through routes", *Thompson v. United States*, 343 U. S. 549, 555, the Commission embraced the testimony of the Rio Grande's solicited and procured shipper witnesses and said that the testimony of those shippers "does raise a

question as to the need for *more* adequate and economic service than afforded by existing routes with respect to some commodities" (R. 69; Italics added).

Before discussing the testimony of those witnesses, we observe that all of them testified for the Rio Grande concerning their desires for *all possible routes at equal rates* without any routing restrictions whatever, for fresh fruits and vegetables, ordinary livestock, wheat, dried beans, lumber and forest products, commodities for cold storage, farm implements, monuments and steel for fabrication. Those witnesses were located in Kansas, Colorado, Utah, Idaho and Oregon, and they ship, receive or "handle" an estimated volume of about 28,000 carloads annually of the commodities just named.

However, the through routes and joint rates required by the order are limited to—

"* * * granite and marble monuments [in carloads] *from origins* in Vermont and Georgia to *destinations in the* * * * *northwest area* * * * and * * * ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, *from origins* in the described excluded territory [*northwest area*] to destinations in the United States [in the] south and east * * *." (Italics added). (V. II, 1595)

Thus, the order is clearly designed for the benefit of shippers in and from the "originating" area in Utah north of Ogden and Idaho, Montana, Oregon and Washington (which the Commission's report refers to as the "excluded territory", the "originating area" and "the northwest area or territory") (R. 26, 70, 71).

Although the report discusses at length and in detail the situations of numerous witnesses located outside

the "originating" or "northwest area" in Utah south of Ogden and in Colorado, and Kansas, the order does not include them, hence, search for evidential support, if any, for the order must be confined to testimony of Rio Grande shipper witnesses located in the "originating" or northwest area described above, and who ship commodities on which the order requires through routes and joint rates. Only 15 such shippers are located in the northwest area, of whom 12 are shippers of fresh fruits and vegetables from origins in the northwest area, 2 are shippers of livestock and 1 is a receiver of monuments. The estimated volume of their traffic is about 10,000 carloads. All of those shippers are located exclusively on the shorter, faster Union Pacific routes and they enjoy the lower joint rates and full transit privileges of those routes. Thus, the order rests upon the testimony of 15 of the Rio Grande's solicited and procured witnesses who handle about 10,000 carloads annually of the articles on which the order requires through routes and joint rates in connection with the Rio Grande's longer, slower and more onerous route.

But not one of the Rio Grande's shipper witnesses testified that present services of Union Pacific routes are "inadequate" for the traffic hauled. Indeed, their testimony was not concerned with the adequacy, efficiency or economy of Union Pacific routes, but with the fact that they must pay higher rates if they ship via the Rio Grande than when they ship via Union Pacific routes which they now use, and with their *desire* for removal of all routing restrictions which protect carriers' right to their long hauls, "a right guaranteed by Section 15(40), *Thompson v. United States, supra*, 559.

Reference to the testimony of a few of the Rio Grande's shipper witnesses will serve to illustrate and

demonstrate the "indisputable character" of their testimony, the vague, untenable and irrelevant reasons given by them for desiring longer routes via the Rio Grande and the lack of credibility, probative force or merit in their testimony individually and collectively.

The Secretary of Agriculture, for example, who intervened in support of the Rio Grande in the proceeding before the Commission and as a defendant in the district court, is in complete disagreement with the Congressional policy, insofar as it relates to agricultural commodities, of affording carriers protection under Section 15(4) against short-hauling under compelled through routes. A witness for the Secretary testified that he was opposed to any routing restriction on any agricultural commodity regardless of any consequences that might be inflicted upon carriers that would be short hauled or upon their ability to render adequate and efficient service generally to shippers located on their lines (V. II, 1077). This disagreement with the Congressional legislative policy and his support of the Rio Grande in this case directly opposes the position and testimony of some 85 shippers and producers most of whom are in the northwest area who testified against the Rio Grande and who ship about 136,000 carloads of freight annually, of which nearly 50 per cent consists of agricultural commodities and livestock. The testimony for the Secretary also contradicts testimony of witnesses for the public service commissions of Montana, Washington, Oregon, Wyoming and Nebraska who also oppose the Rio Grande's complaint. In supporting the Rio Grande's complaint, the Secretary disregards and stands in opposition to the overwhelming majority of shippers and public representatives in the northwest.

A. G. Stanger, of Idaho Falls, Idaho, served only by Union Pacific, ships potatoes, onions and turkeys to the Southwest, Middlewest and East. He believes shippers owning their products should have the right "to route them as we see fit" and that this is in keeping with the principle which "has founded and helped to build this country by free enterprise." He wants "flexible" diversion or reconsigning privileges *on various routes to "try" markets* and failing to sell at one, then move on to other points at joint through rates. He says "competition is the life blood of American business" (V. I, 254, 253, 256).

This witness finally stated his real reason for supporting the Rio Grande.

"If the Union Pacific or the carriers fail to give us cars with which to move this produce then, *as retaliation, or to help to put the Union Pacific on their toes*, we can take the freight away from them and ship it over the D&RG, which at the present time we cannot under circumstances unless we are penalized" (by the combination rates via D&RG). (V. I, 257; Italics added.)³¹

He thinks the sought routes and rates via the Rio Grande might induce the Union Pacific to "help develop" the Idaho territory, apparently for the purpose of creating more traffic to be diverted to the Rio Grande.

³¹ During periods of "peak" traffic when there are not enough cars to supply all shippers with all cars they order, the Union Pacific distributes without preference or discrimination the available cars proportionately among shippers based upon each shipper's past need for and ability to load cars, a method approved and required by the Interstate Commerce Commission. Obviously, this witness had been misled to believe that the Union Pacific would or could furnish more than his equitable proportion of cars merely upon his threatened "retaliation" to route his traffic away from the Union Pacific to the Rio Grande.

Union Pacific built lines in Idaho about 1880 when there was nothing to haul and the total population of the Idaho territory was only 32,000, and many shipper witnesses highly commended Union Pacific for its cooperative part in developing Idaho and contributing to its improvement and economic welfare (V. I, 260, 261).

Witness Bass, another Idaho potato shipper, supports the Rio Grande because he says he cannot sell in certain markets "with safety", that he is "very much in favor of free enterprise" and thinks closed gateways restrict our freedom." His company did not decide they wanted routes with equal rates via the Rio Grande until after they heard the propaganda and promises of Rio Grande's representatives, and it is certain from his testimony that neither his Company nor Idaho produce shippers generally have suffered for the lack of through routes and joint rates via Ogden and the Rio Grande, since Idaho ships to all markets in the 48 states, and exports to Canada, South Pacific, South America, Cuba, South Africa and other points (V. I, 243, 244, 246).

Witness Davis, Idaho Falls Chamber of Commerce, testified (V. I, 225) that he wanted all gateways open "that restrict the economy of eastern Idaho", but he did not explain in what manner, if any, the economy of Eastern Idaho is restricted by the present lack of longer routes via Ogden with the Rio Grande or how it would be improved by taking millions of dollars in revenues from the Union Pacific, and passing those millions to the Rio Grande.

L. E. Stephens, potato shipper and dealer in grain and feed, whose potato markets cover the entire United States with the exception of Maine" (V. I, 247), supports

the Rio Grande, but has never shipped to any market on the Rio Grande except Denver (V. I, 247), which is also served by a shorter line of the Union Pacific. He claims he has suffered at times from lack of cars (V. I, 248), but witness Hanson shows that Stephens misstated his car supply situation, and, in fact, along with other Idaho potato shippers, inflated or overstated the number of cars they could load during car shortages, a trick or subterfuge among shippers, well known to railroad officials and to the Commission itself (V. I, 650). Stephens said there are certain markets which are "closed" and "a shipper is not too familiar with the tariffs, and will get into a market of this type unknowingly and then will be unable to get out." He could not name any such market except Wichita, Kansas (V. I, 249), but witness Stilling demonstrated that Stephens was in error with respect to Wichita being a "closed market," and, in fact, that the alleged "pocket market" situations mentioned by some of the witnesses "does not actually exist" (V. I, 851), and the Commission's report shows (R. 57) that the shipments could have been reconsigned from Wichita to destinations in the southwest at joint rates. Stephens did not explain how he expected his alleged car shortages to be relieved if the Rio Grande obtained the routes and rates sought in this case, nor could he make such explanation because the Rio Grande does not propose to transport anything to or from points north of Ogden or to extend its transportation services in any way. The implication is that with the same rates via the Rio Grande, he could and would follow witness Stanger's purpose to route against the Union Pacific in "retaliation" if the Union Pacific was unable to furnish him cars as and when he wanted them.

Witness Harris, a wheat farmer and dealer in implements and hardware at Rexburg and St. Anthony,

Idaho, thinks the Union Pacific has a "monopoly" upon the traffic of shippers which it serves exclusively, and believes that gateway problems "are barriers entered against our freedom of competition." He apparently was not speaking of the Ogden gateway but of "[t]he gateways in Kansas, in Nebraska and in Colorado." He was entirely unable to describe what restrictions, if any, he is under with the present rate situation and could give no specific illustration. He is located on the Union Pacific, has lower rates than the Rio Grande, and his inbound shipments of hardware and gasoline move direct to Idaho from Rock Island or Chicago, Illinois, or Salt Lake City, respectively (V. I, 233, 236).

Witness Higgins, a member of the Executive Committee, Idaho State Grange, made it quite clear that the members of the grange had not felt the need for the sought routes and rates via the Rio Grande until after its complaint was filed. Some of the resolutions from the local granges stated that opening the Ogden gateway might "possibly open up new markets and create better facilities for handling the produce" but "they never specified any particular markets"; they thought "they would possibly have better service" but "they didn't state in the resolution why they thought they would have better service" (V. I, 265). Higgins said opening the Ogden gateway *might* give Idaho shippers competitive rates to new markets and that "competition, in my estimation, does a lot of things, and I thought possibly it would help to eliminate the shortage of cars and give us better service than we had previously" (V. I, 267).

Witness Adams, a "buying agent for jobbers throughout the country" including the buying and shipping of

potatoes, supports the Rio Grande in order "to bring about a competitive effort", and he thinks the opening of the Ogden gateway would eliminate considerable "discrimination" in times of car shortage because "it would be used as a competitive weapon or a weapon in competition" (V. I, 475-476).

Despite the fact that Idaho producers ship to markets in all 48 states and 5 or more foreign countries (V. I, 246), witness W. B. Long, produce shipper at Twin Falls, Idaho, said "I am not just here in the belief that they should open the Ogden gateway. *I think all gateways should be opened*, so that perishables may move when and where you want to move them" (V. I, 478) (Italics added).

Witness Titus, Executive Vice President, Western Forest Industry Association, Portland, Oregon, testified that his Association supports the Rio Grande because it is "necessary to carry out the national transportation policy," although his Association was interested in only two or three items of forest products (V. I, 214). Asked what need there was for the routes and joint rates via the Rio Grande and Union Pacific and what use of them would be made by shippers in his Association, and he answered: "No, I don't think anyone knows, until the situation is such that it could be utilized, no one is going to develop the territory." He further said "our shippers like to be free to ship in all directions, and over all lines." He did not know whether any members of his Association were interested in routes via the Rio Grande, or whether a single carload of lumber might move over such routes if established (V. I, 218).

Witness Miller, manager of a canning company at Milton, Oregon, testified that "we resent the discrimina-

tory practices that make us ship over certain routes" (V. I, 540), but that "the strongest argument" in favor of the Rio Grande's complaint in this case is that "it would give us another route in the event storm areas would develop along the Union Pacific" (V. I, 539), although he never knew the Union Pacific to be blocked by storms except once and then some of his shipments were rerouted via the Rio Grande at the same rates he had via Union Pacific (V. I, 540).

(Of course, such emergency use of all railroads is expressly provided for by the last sentence of Section 15(4) of the Act.)

Witness Lau, farmer and President Idaho Farm Bureau Federation, asked by his counsel why he favored "the opening of the Ogden gateway", said "[p]ersonally, it doesn't make any difference to me" (V. I, 554), but that his board of directors sent him to state its "stand" which was (V. I, 554).

"* * * that by opening this gateway it will create competition which our people have always thought develops good business. They feel that if there is competition created, it is going to bring about better service, and they also feel that they should have the satisfaction themselves in where they ship their products, over what roads, without being penalized."

He did not say that Union Pacific routes are inadequate or inefficient, or that better service was expected from the Rio Grande's longer and "more onerous" route. He thinks he might benefit "indirectly" if the sought routes and rates were established (V. I, 559), but he "never even had thought of it up until that time" (V. I, 557), when he said there was a car shortage which the Rio Grande apparently refused to alleviate because it

wouldn't get the traffic. He said it would be detrimental to him, and his Federation if diversion of traffic to the Rio Grande resulted in curtailment of Union Pacific's main line train service, an increase in its rates to offset loss of revenue from the diversion, less frequent switching and spotting of cars for loading and unloading, or payment of less taxes by Union Pacific to the state and counties of Idaho (V. I, 559).

Witness Batt, shipper of produce from Caldwell, Idaho, supports the Rio Grande because it is his "conviction" that "any obstacle, natural or artificial, which interrupts the free flow of those agricultural products does not serve the best interest of the community or the area in which I operate." His principal market is Chicago, then Kansas City and next St. Louis, with a substantial volume of shipments to New York, to all of which markets the Union Pacific, which originates the traffic at Caldwell, is the shortest, the direct and single-line route to the Missouri River. The bulk of his commodities are marketed east of the Missouri River and in the northern part of the country, mostly in the Chicago area. He thought that through routes and joint rates via the Rio Grande would reduce the activities of "an unscrupulous receiver" who refuses a car in order to get an unjust allowance for claimed but faked damage, and that he would not have testified if he had not thought that such unscrupulous practices would be reduced or partially eliminated. This desire for protection from unscrupulous dealers "is the principal reason that I am here, sir." He said that he had made the statement in defense of the Union Pacific in discussing this case that while competition can be beneficial "it can also be destructive" and that he was not testifying in this case to produce additional competition or routes (V. I, 421-424).

Witness Rosenblatt, whose business is warehousing and manufacturing iron and steel articles at Salt Lake City, which is served by Union Pacific lines to the east, north and south, was asked whether his company would benefit by the through routes and joint rates sought by the Rio Grande, and he answered (V. 1, 223):

"Only to the extent that we would be in position to repay the D&RG and their urgent solicitation for our business as a reward for the very good service they give us for handling in and out cars at our plant."

The Commission's report states (R. 51, 70) that a "fabricator and wholesaler" of monuments at Brigham City, Utah, on the *Union Pacific*, 21 miles north of Ogden, has "a special need" for through routes and joint rates on granite and marble monuments from Georgia and Vermont to destinations in the northwest area and that the need is "urgent" to enable the Brigham City dealer to fabricate stone at that point and ship in less-than-carload quantities at carload rates to a retailer at Grand Junction on the Rio Grande and to stop to partly unload at intermediate points on the Rio Grande. On such fabricated stone the shipments would move from Vermont or Georgia to Brigham City and, under the Commission's order, would move in less-than-carload quantities, presumably at the balance of joint through rates, in a *back-haul* of 332 miles from Brigham City to Grand Junction.

The "fabricator and wholesaler" at Brigham City is witness Bott who stated that his entire business which he distributes to retailers in various states *would not exceed four carloads a year* (V. 1, 393) and the report shows that the business of the retailers is so small that they cannot deal in carload lots.

The report says the Brigham City dealer has "keen" competition with a like dealer at Salt Lake City. But,

since both of these dealers are located at points served by the Union Pacific they have identical rates and transit privileges. The Brigham City dealer testified that he has complete transit privileges on all shipments that move via Union Pacific to destinations on its line (V. I, 392) and as Salt Lake City is on the line of the Union Pacific, both the dealer at that point and the dealer at Brigham City may fabricate or transit stone and move it on into Idaho at equal joint rates to points on the Union Pacific. Since the joint rates do not apply via the Rio Grande, neither of these dealers can ship "bridge" traffic via that line at joint rates and transit privileges. As to the less-than-carload retailer located on the Rio Grande, his situation is simply that of less-than-carload shipments hauled at carload rates. It is not the duty of the Union Pacific or any other railroad to equalize a retailer with a wholesaler for this Court has held that, "[t]he law does not attempt to equalize fortune, opportunities or abilities", *Interstate Com. Comm. v. Duffenbaugh*, 222 U. S. 42, 46. If this were not the law, then every less-than-carload shipper would be entitled to rates and privileges that would equalize him with carload shippers.

The report states (R. 52) that "[a] substantial portion of this traffic has been lost to the trucks", but this fact is irrelevant to a finding of public "need", under Section 15(4) for an additional railroad route or inadequacy of existing routes. While the witness said that the monument business was going to trucks, he made it plain that from the railroads "we don't get the service that the truck people give us"; that his competitor trucks stone from the West Coast and from Wisconsin and Minnesota in "duplex trucks" and that he cannot compete with those conditions (V. I, 390). It is indisputable that the truck competitive conditions could

not be met or overcome by establishing an additional through route over the Rio Grande's 219 mile longer and more onerous line. Since the total business of this Brigham City wholesaler would not exceed four carloads per year and his retailers can handle only less-than-carloads, it is the height of frivolity for the Commission to assert that such testimony proves an "urgent" and "special" need for through routes and joint carload rates via the Rio Grande on this commodity, especially since nothing will be accomplished except to furnish distribution service by rail of less-than-carload lots at carload rates. Regardless of the desire of these dealers to increase their profits to that extent, the fact remains that the Brigham City dealer is at no disadvantage whatever compared to his alleged competitor at Salt Lake City and it results that there is no possible evidential basis for a finding of a public "need" for routes via the Rio Grande.³²

Witnesses for the Rio Grande brotherhoods and employees resorted to repeating what they had learned in its propaganda campaign. Witness Warner explained his presence by saying: "We are very much interested in a good old American principle, * * * free enterprise * * *

32 Circuit Judge Johnsen properly evaluated this monument dealer's situation as follows (R. 174):

"I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of 'urgent need' (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union-Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country."

(V. II, 1306), and witness McDonald also for Rio Grande brotherhoods said "there is a principle involved here of free enterprise and competition" (V. II, 1313).

Witness Chipman, also testifying for the Rio Grande brotherhoods, hits at "monopoly" and "discrimination"; the very words Rio Grande representatives used so freely and constantly in their campaign of accusation against the Union Pacific and agitation among shippers to obtain their support. Chipman thought if the "monopoly is dissolved" the Rio Grande's traffic solicitors could obtain enough Union Pacific business to make secure the employment of the Rio Grande employees for whom he was speaking (V. II, 1217).

When pressed for facts to support their desires or beliefs that they should have the same rates via the longer Rio Grande that they have via the shorter Union Pacific routes, the Rio Grande shipper witnesses resorted to irrelevant conclusions, generalities concerning economic welfare of their states and the country, and even the legal conclusion taught them by Rio Grande propaganda and persuasion that the Union Pacific holds a harmful "monopoly" over the transportation of communities located exclusively on its route and of commodities which originate or terminate on its line, or, in other words, that every railroad has a "monopoly" of transportation at points on its line unless those points are also served by another railroad. Those witnesses were unable to state facts to show how they were damaged or handicapped by having lower rates and shorter routes via the Union Pacific, or what necessity if any, there might be for through routes and equal rates via the longer, slower and more onerous Rio Grande route.

Indeed, such facts as they stated squarely contradict their pretense for a need of the Rio Grande route. For example, witness Bass, supporting the Rio Grande, testified that shipments of his producers organization move to markets in "the entire forty-eight states" and to Canada, South Pacific, South America, Cuba, Africa and other points (V. I, 246). The Commission's report ignores these undisputed facts and the legal effect of them. In the face of such facts it says (R. 70) that those shippers "are debarred from effective participation in the widespread system developed for the marketing of such commodities." Obviously ignoring the national and international distribution by Idaho producers, the Commission quite apparently rests its conclusion upon the witnesses' belief in "free enterprise" and their thought that "all gateways should be opened."

At least 15 of the Rio Grande shipper witnesses characterized their testimony by insisting upon abstract and general principles of "free enterprise," elimination of "monopoly," "freedom of competition," "free flow of goods," "free markets," routing traffic to the Rio Grande in "retaliation" against the Union Pacific, desirability of equal rates via the Rio Grande for use as "a competitive weapon or a weapon in competition" in periods of car shortages.

The testimony of all of the Rio Grande's shipper witnesses rests upon the basic proposition that Congress is and always has been wrong in affording carriers any protection against being compelled to join in through routes that short haul them.

Such testimony, in addition to the fact frankly admitted by Rio Grande that it was obtained by solicita-

tion and persuasion to help the Rio Grande win its case, obviously is without "rational probative force," and is not "such relevant evidence as a reasonable mind might accept to support a conclusion," *Edison Co. v. Labor Board*, 305 U. S. 197, 229, 230, that there is public necessity or need for shippers to have equal rates via the Rio Grande's longer line to provide adequate and more economic transportation than the same shippers have via the shorter and faster Union Pacific.

The term "public interest" has "direct relation to adequacy of transportation service to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities," *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, 25, but the testimony of the Rio Grande's solicited and procured shipper witnesses clearly is devoid of any such relation. The vague and irrelevant reasons given by the witnesses for the longer, slower and "more onerous" Rio Grande route are squarely contrary to the "primary aim" of the Congressional "policy to secure the avoidance of waste," which, "as well as the maintenance of service, is viewed as a direct concern of the public," *Texas v. United States*, 292 U. S. 522, 530.

To require through routes and joint rates that short-haul existing routes upon such evidence; as the Commission does in this case, is to ignore the Congressional concern with the "preservation of the earning capacity, and conservation of the financial resources of individual carriers" that will lose the traffic and revenues for the benefit of the Rio Grande, *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277.

Examination of "the whole record" will compel the decision that the Commission's order is not "justified

by a fair estimate of the worth of the testimony," and that the Commission has failed completely to take into account the circumstances, recited above, that detract from and destroy the weight of the Rio Grande's shipper testimony on which the order rests, *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 482, 488.

(b) The Commission arbitrarily ignored, distorted and gave no weight to the overwhelming preponderance of evidence against the Rio Grande.

Against the testimony of the witnesses supporting the Rio Grande, 120 shipper and public witnesses testified in opposition to the Rio Grande's complaint, of whom 85 are shippers who ship and receive approximately 136,000 carloads of traffic annually. Some 70 of these witnesses ship or receive a total of about 65,000 carloads annually of the commodities on which the Commission's order requires through routes and joint rates in connection with the Rio Grande from the northwest area.

Their evidence established the undisputed fact (not disclosed in the Commission's report) that since 1906 and 1912 when through routes and joint rates between the Oregon Short Line Railroad Company with the Rio Grande via Ogden were cancelled, there have been no complaints or demands by shippers to state commissions or the Interstate Commerce Commission or the railroads for establishment of such through routes and joint rates. This is shown by undisputed testimony of the state commissions of Montana, Washington, Oregon, Wyoming, and Nebraska (V. II, 988, 915, 954, 1322, 1183).

The complete absence of shipper or public demand for the through routes and joint rates sought by the Rio Grande was ignored by the Commission, but it demon-

states not only that there was no public interest in the Rio Grande's proposal, but also that it was only by its propaganda campaign of agitation that the Rio Grande was able to inject into the case procured shipper testimony on which the Commission has based its order, after finding that the record did not justify any findings favorable to the Rio Grande upon its own testimony.

Since public interest is to be determined by weighing and appraising the interests, circumstances and activities of all of those for whom testimony was submitted, it is appropriate to point to the fact that the public service commissions of the States of Washington, Oregon, Montana, Wyoming, and Nebraska, which intervened in opposition to the Rio Grande's demands as shown in the report (R. 65), represent the interests of all citizens in those States and must be considered as having spoken in behalf of the entire population of those States, with the exception of those few individuals who were procured by and appeared in support of the Rio Grande. Attention is called to the fact that the total population of the intervening states opposing the Rio Grande was nearly 7,000,000 people as of 1940 and we think the Commission was extremely arbitrary in refusing to give effect to the interventions and testimony of those States as expressing the interests, needs and desires of this great number of people. The interests of many of them were voiced again through commercial or other organizations of which they are members and many others personally testified with respect to their own individual interests.

Of the shipper and public witnesses who testified in opposition to the Rio Grande—

33. Several of these witnesses were shippers of two or three commodities, which accounts for an apparent larger number who testified about particular commodities, than the total number who testified against the Rio Grande.

- 33 testified on behalf of state public service commissions, chambers of commerce, farm organizations, labor unions and various civic or commercial groups.
- 29 were shippers of livestock.
- 37 were shippers of fruits and vegetables.
- 6 were grain shippers.
- 9 were lumber shippers.
- 3 were seed shippers.
- 4 were shippers of farm machinery and supplies.
- 7 were shippers of products of mines.
- 1 was a shipper of building materials.
- 30 were shippers of miscellaneous articles, such as paper products, beer, honey, aircraft parts, wool, general merchandise, groceries, contractors' supplies, etc.

Shippers opposing the Rio Grande ship and receive from and to the northwest area about 136,000 carloads annually of the same commodities shipped by witnesses supporting the Rio Grande, and all of them ship to and from the same general markets and areas.

The evidence submitted by the shipper and public witnesses opposing the Rio Grande established the following facts (V. II, 913-1068; 1082-1126; 1181-1203; 1281-1293; 1318-1515):

(1) Transportation facilities, service and routes of the Union Pacific are entirely adequate and satisfactory.

(2) Through routes and joint rates sought by the Rio Grande have never been needed or requested and are not necessary now or for any time in the foreseeable future, and would not be used by shippers now using the Union Pacific because the Rio Grande's routes would be longer, delaying their shipments in transit, and would require additional interchanges between carriers contributing to loss and damage to their commodities.

(3) If the Rio Grande should take any appreciable volume of traffic and revenues from the Union Pacific, the result would be retrenchments by the Union Pacific to save operating expenses, curtailment of train service to shippers and abandonment of branch lines, and these results would seriously and injuriously affect the business activities of shippers and the welfare of the general public along its line.

(4) The Union Pacific has co-operated and aided in the building and development of the communities it serves, has built branch and feeder lines to develop many areas for the purpose of retaining its full main line haul of such traffic and it would be unjust at this late day to permit the Rio Grande, without contributing any facilities or service in the northwest, to divert any of such traffic away from the Union Pacific.

(5) The Union Pacific contributes greatly to the economic welfare of the communities served by it in investments in those communities, employment of large numbers of people, payment of large amounts of taxes that go to the maintenance of schools and all other public institutions in those States and communities.

(6) Anything that prejudices or injures the Union Pacific is detrimental and injurious to individual shippers served by it and to the general economic welfare and public interests of those communities.

(7) While they will continue using the Union Pacific for traffic over which they control the routing, most of them ship and receive perhaps the bulk of their traffic over which control of routing is in the hands of their customers in many distant parts of the country who might be persuaded by Rio Grande solicitors and those of its

connections to route the traffic via the Rio Grande without realizing the serious detriment that would result to the shippers and communities on the Union Pacific through the latter's loss of the traffic.

(8) It would be unjust and unreasonable for the Rio Grande and its shipper witnesses seeking only financial gain for their individual selfish reasons with no proposal to contribute any public benefit as an offset to the Union Pacific or the shippers and citizens along its lines, to undermine and jeopardize transportation service of the witnesses supporting the Union Pacific who are fighting to retain good transportation service and to prevent any potential deterioration or curtailment of the service or in the ability of the Union Pacific to contribute to the communities in the form of future investment and developments and expansions in employment, in taxes to the States, counties and cities and to the general economic prosperity of the communities it serves.

(9) Rio Grande's livestock shipper witnesses misled the Commission to believe that they are at a competitive disadvantage because of their inability to buy and ship livestock out of Idaho and the Northwest for feeding or breeding in transit on the Rio Grande and southern Colorado at the same rates that apply when livestock from that area is shipped via and fed in transit on the Union Pacific. Those Rio Grande shippers have considerably lower rates with feeding in transit privileges on livestock from Colorado, New Mexico and the southwest than the rates applicable on cattle from that area for feeding on the Union Pacific, and because of the increasing demand for livestock on the Pacific Coast there is practically no available feeder stock supply in Idaho and the Northwest area for stock feeders on the Rio Grande and in southern Colorado.

(10) Stock feeders on the Union Pacific in Idaho, Wyoming and Nebraska buy livestock from the southwest and all other places where available regardless of through rates and transit privileges, and that privilege is not controlling. They pay combination of feeder rates inbound and fat cattle rates outbound on much of the livestock handled by them.

(11) Bean processors on the Rio Grande would gain an unduly preferential advantage over dealers located on the Union Pacific and the Burlington if the prayer of the Rio Grande is granted.

(12) No "pocket markets", as claimed by Rio Grande's witnesses to result from present routes and rates, have been discovered or encountered by these shipper witnesses south or east of Denver or elsewhere in shipping some 136,000 carloads annually of potatoes, onions, fruits and vegetables and others of the same products shipped by Rio Grande's shipper witnesses to the extent of about 28,000 carloads annually.

(13) There are no markets along the Rio Grande for Idaho vegetables and other perishables because those products are grown along that railroad.

(14) Union Pacific tariffs afford a "variety" of ample routes and transit privileges for fruits, vegetables and other products to markets throughout the United States and foreign countries, and in many years' experience shipping such products no need has ever been felt for routing them via the Rio Grande.

(15) Fruits and vegetables, and other perishable articles should move to markets as expeditiously as possible by the most direct route with the fewest interchanges

between carriers. The longer time in transit and the additional interchanges via the Rio Grande would result in deterioration or damage to such articles and loss to shippers and their customers.

(16) Even though through routes are made via the Rio Grande, shippers in Idaho and the northwest will still be dependent on the Union Pacific for refrigerator cars and other equipment, as the Rio Grande does not propose to serve them with its own tracks and facilities.

(17) Union Pacific service has been "highly satisfactory" from the standpoint of car supply, transit time, diversion orders, etc.

(18) Shippers located on the Union Pacific in Idaho and the northwest cannot expect Union Pacific to continue to spend money to give good service if, after it has furnished the cars and borne the expense of assembling the traffic, it is faced with the constant threat of diversion of a large part of the traffic from it to the Rio Grande.

(19) Prompt and dependable rail service is absolutely necessary to the shipping and marketing of the perishable commodities grown in Idaho. The Rio Grande cannot contribute to such service, but on the other hand, will have serious adverse effects upon it.

(20) Time is "of the essence" in handling, assembling and transporting perishable commodities to market, and the Rio Grande's longer route would delay rather than speed up the movement of the traffic.

(21) Shippers located on the Union Pacific in the northwest know from experience that present good serv-

ice of that line cannot be maintained if it is deprived of substantial traffic and revenues by diversion to the Rio Grande.

While in procuring shippers to support its case, the Rio Grande accused the Union Pacific of having a "monopoly" on the traffic which it originates and terminates at points on its line in the northwest area, the undisputed evidence of shippers and others clearly shows that the traffic sought by the Rio Grande in the northwest area is already supplied with abundant transportation service and routes. Moreover, it should be remembered in this connection that the Rio Grande does not propose to construct trackage or to add anything to transportation facilities in the northwest.

The northwest area is served not only by the Union Pacific, but also by the Great Northern, the Northern Pacific, the Milwaukee, the Southern Pacific, the Spokane, Portland and Seattle and numerous short lines of railroad. Transportation by water, coastwise, intercoastal, foreign and Columbia River barges, is available. In fact, the availability and use of water transportation for traffic to and from the northwest has given the shippers very low and depressed rail rates.

The adequacy and sufficiency of rail transportation for the traffic the Rio Grande seeks is admitted by the Commission where it says in its report (R. 62) the Union Pacific facilities are "adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future," and that the evidence shows the Union Pacific "has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line."

In addition to the several transcontinental railroads and short lines, the northwest area is, of course, supplied with the customary motor carrier transportation, both public and private. In Idaho alone, for example, there were 64,151 trucks and 32,607 trailers registered in 1949. These included private, commercial and common carrier vehicles (V. I, 779).

With respect to the adequacy of existing rail transportation facilities and service in that area and their present unused capacity, Witness W. F. Kirk, a Railroad Operations Consultant with more than 50 years of practical experience in railroad operations and in transportation work, including the position of Regional Director of the Railroads, in 24 states as Agent of the Commission and the Office of Defense Transportation during World War II (V. I, 891, 892), testified as follows:

"Railroad service available to shippers in the States of Idaho, Montana, Oregon and Washington, served by the Milwaukee, Great Northern, Northern Pacific and Union Pacific which were operating with less than a capacity load during the war period, was uniformly good although, due to some local and brief interruptions, it was necessary infrequently to divert some traffic as between these four railroads. However, it was never necessary or logical to reroute any noticeable amount of traffic, either originating or terminating in the above-mentioned states to the D&RGW through the Salt Lake or Ogden gateway.

* * * * *

"The four transcontinental railroads serving the states of Idaho, Montana, Oregon and Washington have maintained through freight schedules with connecting lines to and from the east, south and west for many years. These through schedules afford frequent and dependable service to their patrons in those states."

The record shows that some 50 witnesses who supported the Rio Grande ship and receive only about 28,000 earloads annually, and that 120 public and shipper witnesses, shipping 136,000 earloads of freight annually, testified against the Rio Grande.

While the Commission admits (R. 65) that "a large number" of shippers, representatives of state commissions and other organizations opposed the Rio Grande and testified as to the adequacy, efficiency and satisfactory character of service over Union Pacific routes, and that they never had any difficulty in reaching markets via those routes, nor felt any need for the Rio Grande route, the Commission minimizes and obscures this large volume of testimony and disposes of it by saying "[i]t is not practicable to deal with all of this evidence in detail" but that it has been "considered." Yet, it devotes 13 pages of its report (287 I. C. C. 634-647, R. 48-61) to a highly detailed statement and discussion of shipper testimony in support of the Rio Grande, emphasizing their particular individual situations and disclosing obvious solicitude for the desire of those shippers to enhance their profits through rate reductions via the Rio Grande regardless of injury resulting from short-hauling the Union Pacific. One who reads the report, with knowledge of the testimony of record would be justified in concluding that the report was designedly written so as to leave the impression that the shipper and public testimony submitted in opposition to the Rio Grande was so lacking in substance, merit or credibility as to justify no place, space or discussion, and that only the Rio Grande's shipper testimony deserved full exposure and discussion in the report.

There is no reason why the testimony of the 120 witnesses who testified against the Rio Grande should not be

accepted at full face value equally as the Commission has accepted the testimony of the 50 witnesses supporting the Rio Grande.

* The tenuous, vague and speculative possible prospective use that the Rio Grande's procured witnesses would make of joint rates via that line clearly resolves, at most, into a simple desire for equal rates via an additional route enabling them to divert their traffic from Union Pacific routes in "retaliation" for some irrelevant, non-transportation reason. The Commission, nevertheless, give such testimony full weight and credibility while it give no weight or effect to the testimony opposing the Rio Grande of shippers and receivers of 136,000 carloads annually of the same kind and types of traffic handled by the Rio Grande's shipper witnesses, to and from the same producing and marketing areas, whose testimony show beyond question that the shippers and receivers of that far greater volume of traffic have experienced throughout the years none of the alleged handicaps claimed by Rio Grande's witnesses because of lack of joint rates via that line with the Union Pacific to and from the northwest and that the absence of such joint rates has presented no obstacle or difficulty in the distribution of their commodities or in reaching adequate market areas freely.

The Commission's statement (R. 65) that the opposition of this large number of shipper witnesses arises from their fear of "assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic" that it seeks in this case is wholly erroneous and manifests a thoroughly unrealistic and distorted conception of the facts and circumstances that should have governed the Commission's decision in the case.

Many statements and findings in the report lead to a wholly erroneous and incorrect impression of the preponderance of the evidence of record. For example, the statement (R. 57) that "Idaho producers" of fruits and vegetables "find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City" obviously is intended to have readers of the report believe that *all* "Idaho producers" testified to that effect.

The facts are that about 12 "Idaho Producers" and shippers who testified for the Rio Grande ship and receive approximately 10,000 carloads annually of fruits and vegetables and their shipment go to all markets in the 48 states and to Canada, South Pacific, South America, Cuba, South Africa and other points (V. I, 246), and that the 37 "Idaho producers" and shippers of fruits and vegetables who opposed the Rio Grande ship and receive annually over 60,000 carloads of these products, and all of them stated that the lack of joint rates between the Union Pacific and the Rio Grande for this through traffic had never handicapped or interfered with free and wide distribution or effective participation in the markets for their fruits and vegetables.

The further and controlling facts are that 5 witnesses from the State Commissions of Montana, Oregon and Washington, some 37 shippers of fruits and vegetables and 29 shippers of livestock, most of whom were from the "originating" or northwest area, and numerous shippers of other commodities testified most emphatically that the lack of through routes and joint rates via the Rio Grande presented no handicap, obstruction to or disadvantage in their distribution to markets throughout the United States.

The report further is misleading and erroneous in making it appear that Rio Grande shipper testimony is not only of substance and unquestionable credibility but also that it is far more voluminous than it is in reality. For example, in speaking of livestock, the report refers to needs of "[a] number of producers in the northwest area," but it then shows that the Rio Grande witnesses from the northwest who testified about livestock were from a small locality in southeastern Idaho, and the record shows that there were not "a number" but *only two*. (V. I, 485, 507). Not one livestock witness from the vast northwest area except those two, testified for the Rio Grande. In fact, even with its propaganda campaign, the Rio Grande was able to procure only two shipper witnesses from Oregon, Washington and Montana. These were W. S. Miller, representing a canning factory at Milton, Oregon, who said that "the strongest argument" he has for the joint rates is that "it would give us another route in the event storm areas would develop along the Union Pacific" (V. I, 539), and R. E. Titus who actually was not a shipper but was an executive of a forest products association who stated that no one could tell whether the members of that association would use the Rio Grande's route, but that he favored the joint rates via that line because he thought such action "necessary to carry out the national transportation policy" (V. I, 214).

The implication in the report (R. 70) that there are substantial markets at points on the Rio Grande to be "tried" or for the actual sale of substantial quantities of carloads of any commodities, is contradicted by the very clear demonstration in the report (R. 50) that the "small dealers" along the Rio Grande are able to handle only less-than-carload quantities. It is further negated by the fact that, excepting Denver, Salt Lake City, Provo

and Ogden, all of which are served by the Union Pacific, of the 52 stations or points on the main line of the Rio Grande between Ogden and Denver, according to the official 1940 census, four points had no population, one point had 1; 14 points had less than 50; 20 points had less than 100; 31 points had less than 500; 37 points had less than 1,000; 11 points had more than 2,000 and only 3 points had a population of more than 5,000. The record shows no "need" for joint rates to enable a car from Chicago, for example, to partly unload at Pueblo, Colorado Springs, Grand Junction or Price and further movement via the Rio Grande to the northwest area.

In its discussion of the amount of traffic that might be diverted to the Rio Grande, the Commission concludes as follows (R. 46):

"Whatever the amount, it would be the result mainly of (a) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (b) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it."

This conclusion squarely contradicts and refutes the ultimate finding that the through routes and joint rates are "necessary or desirable in the public interest." Certainly the routes and rates are not "necessary" or

"needed" to provide adequate, and more efficient, or more economic transportation if shippers who have pretended such need must be induced by solicitation and persuasion to use the Rio Grande as a "bridge route" or to use transit privileges on that line in connection with bridge traffic. The statement that growth of traffic "over" that line in the 1934-1948 period indicates the interest of shippers and receivers on the Rio Grande in development of transit activities on that line refutes any "necessity" for the joint rates to increase "bridge" traffic via the Rio Grande, for the "growth of traffic" has taken place in the absence of the sought through routes and joint rates. The growth of "bridge" traffic over that line without the joint rates also demonstrates that the report is misleading and erroneous in placing the emphasis it does on the importance of transit activities on that line. Transit activities on that line is an obvious "smoke-screen" of the Rio Grande and its supporting shippers to disguise the Rio Grande's real purpose to enhance its financial position by diverting bridge traffic from the Union Pacific.

In view of the Commission's definite and positive assurance, indicated in the finding last quoted, that no traffic will be diverted to the Rio Grande unless it can succeed in soliciting, persuading and inducing shippers to use its line as a bridge route and for transit purposes, it necessarily follows that there is no actual, genuine or real "public interest" in having the through routes and joint rates established. If, as the Commission has found, a substantial amount of the traffic will not flow naturally to the Rio Grande because of recognition by shippers of "some actual necessity or some compelling reason" for using that line for the traffic involved, then the routes and the joint rates are not in the "public interest". *Jamestown, N. Y., C. of C. v. Jamestown W. & N. W. R. Co.*, 195 I. C. C. 289, 292.

Despite its efforts to minimize the amount of traffic that may be diverted to the Rio Grande, the validity of the Commission's order must depend on "need" for the routes and joint rates, which is the equivalent of a finding that the amount of such diversion will be "substantial", otherwise, the order is frivolous, capricious and unlawful.

3. The finding that the commodities specified in the order must be moved to market "over as many routes as possible" is contrary to the requirements of the Act, in conflict with other facts found in the report, and is contrary to the evidence.

The Commission, in an obvious effort to create a justifiable basis for ordering through routes and joint rates via the Rio Grande, asserts that the commodities specified in the order "must be moved to market with expedition and care, and over as many routes as possible" (R. 62). The first part of this assertion and its implications are wholly misleading. First, while shippers testified that expeditious movement of perishable articles was necessary, no shipper testified that those articles "must" move over "as many routes as possible," and there is no suggestion in the testimony that those commodities are not now moving "with expedition and care", and, second, that routing the traffic over the Rio Grande would retard rather than expedite its movement is positively shown by the correct finding (R. 62) in the report that:

"Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services."

The implication that the traffic is not now moving with "care" and that routing via the Rio Grande would

contribute greater "care" in the movement of the traffic is an obvious distortion of the irrefutable fact that the additional interchanges between the Rio Grande and its connections would add to the probability of damage or injury to the shipments as would the greater distance over its "more onerous" mountain route, and, in addition, there is no evidence whatever to support such implication.

The further implication that an adequate number of routes are not available for flexible, orderly and wide distribution of the specified commodities is without evidential support and is in direct conflict with the correct statement in the report (R. 28) that the transcontinental rates on the specified commodities now applicable via Union Pacific routes and which the Rio Grande seeks to make applicable via its line "generally apply over all routes", although there are many exceptions, the Rio Grande being one such exception because all of the traffic originates and terminates on the Union Pacific routes, which are shorter and direct routes between the origins and destinations of the traffic, and because Section 15(4) of the Act gives the Union Pacific the right to haul the traffic as far as it can in the direction of its destination.

The Commission's assertion that the traffic must move "over as many routes as possible" is plainly contrary to applicable provisions of the Act. As noted earlier, Section 1(4) makes it the duty of common carriers "to establish reasonable through routes with other such carriers". This is far from a duty to establish "as many routes as possible." The requirement is only for establishment of "reasonable through routes" regardless of whether the traffic is of a "general perishable nature" or whether it is ordinary "dead" freight. "The law exacts only what is reasonable from such carriers." *Midland Valley R. R. v. Barkley*, 276 U. S. 482, 485.

No case has been found in which either the Commission or a court has construed the Act as requiring "as many routes as possible" for any traffic of any nature. On the other hand, the assertion that perishable traffic must move over as many routes as possible is not only contrary to the plain language of the Act but is also contrary to the Commission's settled administrative interpretations. For example, in *New York Dock Ry. v. E. & O. R. R. Co.*, 32 I. C. C. 568, in dismissing a complaint of a railroad demanding joint rates to improve its financial condition, the Commission held at page 573:

"The law does not require us to establish through routes and joint rates in all instances where carriers have neglected or refused to do so, but does empower us to do so in proper cases, with the manifest intent of giving effect to the general purposes of the act by securing reasonable facilities to the public."

At page 575, the Commission said:

"... we can not view with favor an effort to require the establishment of such routes and rates merely to enable a carrier to wrest from its connections, or an agent to wrest from its principal, greater compensation."

In *Lehigh Portland Cement Co. v. Lehigh Valley R. Co.*, 238 I. C. C. 199, the Commission said at page 201:

"The statute makes it the duty of common carriers subject to the act to establish through routes and just and reasonable rates applicable thereto. Where this duty has been fully met and discharged and there exists both such reasonable through routes and joint rates, and other routes by combination over which no joint through rates apply, the carriers in our opinion are not required to maintain a parity of rates over both such routes, but may properly maintain through point rates over joint through routes that are somewhat less than the combination of locals used to make

the through rates applicable over the combination through routes, provided that neither rate, under all the facts and circumstances, is more than just and reasonable for the service performed."

In *Kansas City Hay Dealers Assn. v. C. & G. W. R. R. Co.*, 49 F. C. C. 372, the Commission said at page 373:

"To compel the application of short-line rates over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads against the interest of the public as a whole. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes adequate response is made to the reasonable requirements of the public, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes."

In the instant case the joint rates over existing through routes of the Union Pacific and its connections are "neither unreasonable nor unduly prejudicial." In fact, they are expressly found to be reasonable, and the direct routes over which they apply are found adequate to handle any foreseeable volume of traffic (R. 62). On the other hand, the combination rates via the indirect and longer Rio Grande routes are found both unreasonable and unduly prejudicial.

The Commission's assertion that articles specified in the order must move "over as many routes as possible," directly conflicts with the prohibition in Section 15(4) against compelling through routes that short-haul a carrier. In *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, the Court held at pages 276-277:

"The Act does not give the Commission authority to establish all the through routes it may

deem necessary or desirable in the public interest. The general language of paragraph (3) is limited by paragraph (4). The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long-haul routes of carriers.

In the case just quoted, the Commission sought "to limit by construction the impact of the short-hauling restriction on its power to establish through routes", *Thompson v. United States*, 343 U. S. 549, 555. In the latter case, as in the instant case, escape from the prohibition against short-hauling was sought by the Commission through the expedient of arbitrary factual conclusions as well as erroneous construction. Here, by mere arbitrary and unsupported assertion that the "specified commodities must move 'over as many routes as possible'", the Commission would completely emasculate the short-haul prohibition of Section 15(4), for "as many routes as possible" means, as we have said, that perishable articles and the marketing system for their distribution would require through routes at every point where the lines of two or more carriers connect. Such effort to evade or nullify the mandate against short-hauling a carrier is clearly contrary to the purpose of the mandate, and the order is arbitrary and void.

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4. The finding that "the shippers in the originating area" of the specified commodities "are debarred from effective participation" in the system for marketing such commodities, is incorrect, capricious and contrary to the evidence.

The Commission's report states (R. 70):

"The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the wide-spread system developed for the marketing of such commodities."

By that statement the Commission would mislead readers of the report to believe that *all shippers* in the originating area testified to that effect. The facts are that *no shipper from that area made such statement*; that no shipper of butter, eggs, or dried beans from that area submitted any testimony; that only two livestock shippers and about 12 fruit and vegetable shippers from that area testified—not that they were "debarred from effective competition" but that (regardless of Section 15(4)) they desired all routing restrictions and "gateways" removed.

As noted earlier, 12 "Idaho producers" and shippers who testified for the Rio Grande ship and receive approximately 10,000 carloads annually of fruits and vegetables and their shipments go to all markets in the 48 states and to Canada, South Pacific, South America, Cuba, South Africa and other points (R. 60).

Thirty-seven "Idaho producers" and shippers of fruits and vegetables who testified against the Rio Grande ship and receive annually over 60,000 carloads of these products and all of them stated that the lack of joint rates between the Union Pacific and the Rio Grande had never handicapped or interfered with free and wide distribution or effective participation in the markets for their fruits and vegetables.

Fruits and vegetables constitute the great bulk of the traffic in the specified commodities from the orig-

inating area. Idaho potatoes are included in that traffic and they in turn make up most of the tonnage, approximating an average of some 40,000 carloads annually. All Idaho producers and shippers of potatoes and other vegetables are located in territory served exclusively by the Union Pacific and all of them have the choice of joint rates and transit privileges via the Union Pacific or combination rates with transit privileges via the Rio Grande. Thus, they have precisely equal opportunity for effective participation in the marketing of their products. As stated above, producers and shippers of some 60,000 carloads annually of these products testified definitely and positively, in opposing the Rio Grande's complaint, that the lack of through routes and joint rates via the Rio Grande did not interfere with flexible distribution and marketing of their products.

That the Idaho shippers of potatoes and other vegetables have not been handicapped in their distribution and marketing by the lack of through routes and joint rates via the Rio Grande and have no need for them in the future, has already been shown by many facts. Particular emphasis is given to this fact by shippers who opposed the Rio Grande and by data on pages 96 and 97 of the Commission's decision in *Idaho Public Utilities Comm. v. Alton R. Co.*, 251 I. C. C. 93. It is there shown that in 1939 Maine shipped 40,462 carloads of potatoes and Idaho, 34,522 carloads, but in markets "far more distant from Idaho than from Maine" the Idaho shippers sold very substantial quantities where Maine sold small or insignificant quantities. At page 96 the report states:

"At Chicago, where in 1938 and 1939 the totals were 15,863 and 16,506, respectively, there were 5,323 carlot unloads of potatoes from Idaho in 1938 and 5,374 in 1939, and there was but 1 carlot unload of Maine potatoes in 1938 and none from that State in 1939."

The following table and comment at page 97 of that report further shows the freedom of movement and effective participation by Idaho producers in the markets:

Carlot unloads of potatoes, year 1939

At	From Idaho	From Maine
Atlanta, Ga.	218	197
Detroit, Mich.	651	435
Indianapolis, Ind.	294	66
Louisville, Ky.	102	13
Nashville, Tenn.	279	4

For several years, the Idaho potato traffic has increased at most, if not all, of the principal markets. At several cities in the East, South and West, carlot unloads of onions from Idaho exceeded unloads from points in most other States."

Thus, the facts are that the Idaho producers have practically taken over markets throughout the United States for their principal products and are selling them even in several foreign countries. These facts clearly contradict instead of furnishing a basis for the Commission's assertion that shippers in the originating area "are debarred from effective participation" in markets for their commodities. If participation by Idaho producers in all important markets throughout the United States and in several foreign countries is not "effective", it is necessarily due to something other than the lack of through routes via the Rio Grande for it is indisputable that the Idaho products now participate in those markets via the shorter and faster Union Pacific routes. Equal rates via the Rio Grande could not enable them to sell in any market in which they cannot now sell. If there were markets for their products at points on the Rio Grande, they have joint rates to all such points except those served by the Union Pacific and as to those points they have the single factor local rates of that direct line.

The only effect of the Commission's order would be to permit the Rio Grande to divert Idaho fruits and vegetables over its line as a "bridge route" instead of moving as they now do over the Union Pacific to the distant markets such as Chicago, Detroit, Indianapolis and others mentioned in the above table.

The Commission's assertion that shippers in the "originating area" are debarred from effective participation in the markets is plainly a contradiction of the facts of record and furnishes no support or basis for the order.

5. There is no evidence to justify or support the findings that combination rates via the Rio Grande are unjust and unreasonable and that joint rates now applicable via the Union Pacific are reasonable for application via the Rio Grande, and the latter finding is contrary to the evidence.

The Commission's report states (R. 73-74):

"That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes."

Before reaching its "Conclusions" (R. 73), the Commission said:

"The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points embraced within the findings of unlawfulness herein made."

The Commission is justified in condemning rates as unreasonable or otherwise unlawful only upon substantial evidence. Nor may the Commission require carriers to establish rates until it has found upon such substantial evidence that such rates are reasonable. Not only must there be substantial evidence, but the Commission has the "duty of deciding in accordance with it," *Chicago Junction Case*, 264 U. S. 258, 265. In *Edison Co. v. Labor Board*, 305 U. S. 197, at page 229, this Court held:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The evidence must not only be substantial but of such nature as to enable the Commission "specifically to report the facts and give the reasons" on which it concludes that rates are reasonable or unreasonable, *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, 86. A mere "general statement in the language of the statute" that rates are reasonable or unreasonable is not sufficient in the absence of substantial evidence from which the Commission can make findings of fact which support its ultimate conclusions, *Florida v. United States*, 282 U. S. 194, 213. The evidence must be such as to justify a statement of "[t]he precise grounds for the Commission's determination" and enable it to make "the basic or essential findings required to support the Commission's order," *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

The Commission's statement in this case that the combination rates via the Rio Grande are unreasonable and its statement that the joint rates via Union Pacific routes are reasonable for application via the longer Rio Grande route are invalid and void because they were not only made without substantial evidence, but without any

evidence upon which the Commission could determine whether the combination rates or the joint rates were reasonable or unreasonable. *The record is wholly devoid of such evidence.* This is made clear by the Commission itself where it points out that although the Rio Grande submitted a large number of rate comparisons these were limited to comparison of the revenues produced on various commodities by the combination rates compared to those produced by the joint rates and the revenue that would be produced by the joint rates if made applicable via the Rio Grande. The report correctly states (R. 67-68) :

"With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates."

There being no other evidence, it results that the Commission's assertion that the combination rates via the Rio Grande are unjust and unreasonable rests upon the mere fact that they are higher than the joint rates via the Union Pacific, and its assertion that the joint rates are reasonable for application via the Rio Grande rests not upon evidentiary facts concerning their reasonableness, but upon the mere fact that they are lower than the combination rates, that, although the joint rates are admitted by the Commission to be subnormal, depressed

rates resulting from competitive conditions, they are the "going" rates, that they have been established from many years and upon the Commission's erroneous assertion that no one claims the joint rates are below a minimum reasonable level. (For illustrations of the difference between the combination rates and the joint rates, see Appendix to the report (R. 86).)

Plainly, the Commission misconceived and overreached its authority. The combination of local rates may not be condemned as unreasonable merely because it is higher than joint through rates over the same route, and, *a fortiori*, where, as here, the combination rates and the joint rates are not on the same route but the routes of other and different carriers. "A through rate is ordinarily lower than the combination of the local rates," *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, 771, footnote; and the "combination rate itself is ordinarily, if not always, higher than the joint through rates," *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396. "Long hauls have generally been thought entitled to move at a rate less than the sum of the rates for local or short hauls between intermediate points," and this principle of rate-making has "become deeply embedded in the transportation system of the country, and have [has] been approved by the Interstate Commerce Commission, by the federal courts, this one included; and, so far as it has spoken on the subject, by Congress itself," *I. C. C. v. Inland Waterways Corp.*, 319 U. S. 671, 684-685.

Although the Commission finds the joint rates to be reasonable because they are the "going rates," the report does not even suggest any reason why the Commission thinks the combination rates are unreasonable. In fact, throughout the long report there is not a word of discussion concerning the reasonableness or unreason-

ableness of the combination rates or of any evidentiary facts with respect thereto. The subject is not touched upon until the ultimate "conclusion" is stated at the end of the report that the combination rates are unjust and unreasonable (R. 73). This general conclusion in the language of Section 1 of the Act is a complete nullity because the report refers to no basic or evidentiary facts to justify the conclusion, and the record, as we have said, is completely devoid of evidence from which such facts could be stated in the report or from which the conclusion could be drawn. *Florida v. United States*, 282 U. S. 194, 213-215. The mere statement of a conclusion that rates are "unreasonable" must be read in the light of the report as a whole, and is insufficient "unless supported by facts more particularly stated", *U. S. v. Chicago, M., St. P. & P. Ry. Co.*, 294 U. S. 499, 506.

In condemning the combination rates via the longer routes of the Rio Grande because they are higher than the joint rates via the Union Pacific's shorter routes and in concluding that the joint rates are reasonable for application via the Rio Grande's longer routes because they are the "going rates," the Commission fails entirely to adjudicate the reasonableness of either of the rates. Even with its administrative "expertise" the Commission is no more capable, under the law, of looking at a rate of "X cents per 100 pounds" and, without more, determining whether the rate is reasonable or unduly prejudicial, than is a jury capable of looking at a defendant accused of crime and, without evidence, determining whether the accused is guilty.

While conceding that rate comparisons may be of some probative value under certain circumstances, for instance when upon adequate evidence one of the rates

has been found reasonable by the Commission, this Court had the following to say on the subject in *Louis. & Ndash. R. R. v. United States*, 235 U. S. 1, at page 12:

"The same is true of determining, by comparison, the reasonableness of freight charges. Until some standard is adopted they may prove nothing—even where the two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably high, or too low because compelled by conditions over which the carrier had no control. Water competition, rail competition, and competition of markets enter so largely into the establishment of rates that mere distance is not necessarily a determining factor—indeed the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road."

The foregoing quotation is controlling of the situation under discussion because neither the combination rates nor the joint rates required by the order have been determined by the Commission to be reasonable except rates on livestock which it prescribed over 20 years ago. In fact, as shown in the Commission's report, page 654, most of the joint rates which the order would require for application via the Rio Grande are subnormal, depressed rates compelled by water and truck competition. Many of them are lower than rates which the Commission has found reasonable, and others have been specifically found by the Commission to be considerably less than "reasonable maximum" rates which the railroads normally would be entitled to charge. *Lettuce from Idaho, Montana, Nevada, and Oregon*, 229 I. C. C. 572, and *Fresh Green Vegetables from Idaho and Oregon*, 253 I. C. C. 143.

As stated in the report (R. 54), the rates on livestock were prescribed in 1931 by the Commission in *Livestock-Western District Rates*, 176 I. C. C. 1, a mileage scale of rates having been prescribed with rates predicated upon the shortest routes between origins and destinations, but the Commission expressly relieved the carriers from maintaining the rates over such short routes where to do so would result in short-hauling them within the meaning of Section 15(4) of the Act. In prescribing those rates the Commission said at page 83 of its report that livestock is a commodity which from its nature "can not sustain a rate level which will produce more than the cost of rendering the service plus a minimum of profit," and that the rates therein prescribed "will do no more than meet these minimum requirements." In other words, the livestock rates prescribed by the Commission were fixed at a subnormal, depressed level because livestock could not bear its "fair share of the transportation burden." Because of the longer distance via the Rio Grande, livestock rates under the Commission-prescribed mileage scale resulted in a rate 19 cents per 100 pounds more than the rate via the shorter route of the Union Pacific on livestock from the northwest area, as shown in its report in the case at bar. In addition, because of its "more onerous" operating conditions, the Commission, as shown in the report (R. 54) authorized the Rio Grande to add an "arbitrary" of 6 cents on livestock moving between points on the line of that railroad. As stated in the report (R. 55), the Union Pacific and other railroads expressed willingness to reduce the 19-cent differential via the Rio Grande to reflect the shorter mileage over that line resulting from its acquisition of a shorter route through the Dotsero cut-off. Despite all of this and without a scintilla of evidence on which to determine whether the livestock rates

it prescribed over 20 years ago have become unreasonable, the Commission's order would require a reduction of 19 cents per 100 pounds in the admittedly depressed, sub-normal rates it prescribed on livestock, and a further reduction of $8\frac{1}{2}$ cents discussed in the report on cattle from the northwest area moved via the Rio Grande for feeding or grazing in transit at points on that line or connecting lines east of Denver and Pueblo. A clearer example of arbitrary action by the Commission could hardly be imagined. "A finding without evidence is arbitrary and baseless," *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91.³⁴

34 Circuit Judge Johnsen correctly condemned the Commission's action with respect to livestock rates as follows:

"Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock; Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15(4) of the statute: In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations." (R, 177.)

Admittedly, there was no evidence on which the Commission could determine whether the combination rates were unreasonable, and the only evidence concerning reasonableness of the depressed subnormal joint rates compels a finding that they are less than minimum reasonable rates for application via the Rio Grande's longer route which the report admits to be "less favorably situated" (R. 62), inferior physically and beset by conditions which make its operations "more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein (R. 70)—facts which the Commission admits it has recognized for many years (R. 71) by granting the Rio Grande higher rates than those of other lines. But here, the Commission ignores all of these difficulties and says the combination rates via the "onerous" Rio Grande routes are unreasonable to the extent they exceed the joint rates via Union Pacific's shorter route which is more favorably situated, without onerous operating conditions and with at least a 24-hour shorter time in transit and one or two fewer interchanges.

The Commission's settled rule is that bare comparison of the earnings of one rate with another does not afford evidence upon which to base a finding under Section 1. In *Memphis Cotton Oil Co. v. I. C. R. R. Co.*, 17 I. C. C. 313, 318, the Commission said:

"The reasonableness of a rate must of necessity depend upon the conditions surrounding the traffic at the time it moves. The length of the haul; the competition to be met, the cost of the service, the value of the service, the density or volume of the tonnage, as well as the general transportation conditions then existing, are factors that have a more or less definite relation to the rate that a carrier may reasonably demand for a transportation service."

In dismissing a complaint alleging violations of Sections 1, 2, 3, the Commission said in *McHenry Millhouse Mfg. Co. v. N. K. O. & W. Ry. Co.*, 151 I. C. C. 501, at page 502, that:

"We have repeatedly said that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate."

In *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 192 I. C. C. 192, the Commission said at page 195:

"A lower rate over other recognized routes and established junctions is not in itself proof that combination rates over the route of movement were unreasonable."

The fact that the joint rates via the Union Pacific are somewhat lower than the combination of rates via the longer Rio Grande line with its dissimilar and costly transportation conditions, conforms to the rule rather than presenting an exception. In *Fargo Commercial Club v. A. & W. Ry. Co.*, 98 I. C. C. 691, the Commission said at pages 723-724:

"We have consistently adhered to the view in recent years that joint rates should be somewhat lower than the aggregates of the intermediate rates because of the facts that ton-mile earnings should decrease as distance increases and that, as a general rule, a through movement entails less terminal expense than two local movements to and from the intermediate point."

In *Quamah, A. & P. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 205 I. C. C. 253, upon the base comparison of various joint rates over the direct routes with higher combinations resulting if the traffic moved through the Floydada gateway, the Commission held at page 260:

"Usually the combination is higher than the joint rate, and the mere showing of the difference in amount between them is not sufficient to condemn the combination as unreasonable."

In *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183, at page 187, the Commission said:

"* * * the combination rates over a route that short-hauls a carrier may justifiably be higher than the joint rates remaining in effect over other routes. *Routing Grain and Grain Products via Chicago, R. I. & P. Ry. Co.*, *supra*; *Routing via Quarah, A. & P. Ry. Co.*, *supra*; *Western Pac. R. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127; *Routing of Ores via Southwest Missouri R.*, 220 I. C. C. 110."

As Union Pacific's routes are shorter and are more direct and efficient than the longer routes via the Rio Grande, the rule stated in the Commission's decision in *Kansas City Hay Dealers Assn. v. C. & G. W. R. R. Co.*, 49 I. C. C. 372, at page 377, should govern here:

"To compel the application of short-line rates over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads against the interest of the public as a whole. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes adequate response is made to the reasonable requirements of the public, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes."

If a combination of rates via one route becomes unreasonable and unlawful simply because it is higher than a joint rate between the same points via some other and in this instance a much shorter route, the only remedy

lies in wide open interchange between all lines via every available junction point, regardless of carriers' rights under Section 15(4) not to be short-hauled, regardless of the Commission's consistent holdings that joint through rates should generally be somewhat lower than the combination of rates between the same points, regardless of increased terminal and interchange costs by including additional carriers, and regardless of the fact that the result would be to wipe out many basic rate-making principles on which the rate structure has been built.

Despite its admission (R. 67) that the joint rates are depressed and subnormal, the Commission uses them merely because they are the "going rates" as the measure by which to condemn the combination rates and to determine reasonable rates for application via the longer Rio Grande line through Ogden. This is "not a full discharge by the commission" of its duty to adjudicate and determine the reasonableness of rates, *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510. It is not an adjudication or determination at all. It is simply an arbitrary requirement that the lowest rates charged by carriers over their own routes shall be the maximum rates they may charge over other routes they are forced to establish and which short haul them.

The result of the requirement that the joint rates maintained over the shorter Union Pacific routes be made applicable over the longer Rio Grande routes are portrayed in the following table (original I. C. C. Ex. No. 26), which shows that some of the joint rates are so low that they do not produce a profit even when the traffic moves via the shorter Union Pacific routes while others produce a small profit which would be turned into a considerable loss when spread over the longer mileage of the Rio Grande:

6. There is no basis in law or in facts found by the Commission for its conclusion that combination rates via the Rio Grande are unduly prejudicial to shippers desiring to use that route and unduly preferential of shippers using Union Pacific routes, and the conclusion is contrary to basic findings of fact and the overwhelming preponderance of the evidence.

(a) As the shippers found to be unduly prejudiced when they ship via the Rio Grande route are the same shippers found to be unduly preferred when they ship via the Union Pacific routes, and since they have the right to select the route of their choice, there is neither a legal nor a factual basis for the Commission's finding of a violation of Section 3(1) of the Act.

It is clear from the statements and findings in the report and from the Commission's ultimate conclusions that the order, as stated earlier, relates entirely to traffic of shippers and receivers located in the so-called "excluded territory" or "northwest area". For example, the report states that shippers and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, "from the excluded territory" are at a serious disadvantage in marketing their products, compared with "competing shippers and dealers located on the Union Pacific" (R. 59), and that "[t]he shippers in the originating area" are debarred from effective participation in the marketing system developed for the specified commodities. Again, under "Conclusions" (R. 73), "the westbound movements are from shippers in Vermont and Georgia to receivers at 'destinations' in the excluded territory in the northwest area", and the east-bound commodities specified are from shippers at "origins in the excluded territory to destinations" in eastern

and southern United States. The undue prejudice and undue preference of shippers found in the second conclusion is with respect to the specified commodities "from and to the points described in the foregoing finding," that is, the first finding or conclusion that through routes and joint rates are necessary from and to origins and destinations in the "excluded territory," or northwest area.

The shippers and receivers in the "excluded territory" or northwest area include the few who supported the Rio Grande and the far greater number who opposed it. They are all located on the Union Pacific routes in the northwest or "excluded territory." All of them have available the same Union Pacific routes with the same joint rates and the same transit privileges, all of them also have available the combination rates with transit privileges via the Rio Grande.

Shippers and receivers located in the northwest area "using, or desiring to use, the Rio Grande routes" have the same choice that shippers and receivers "using the Union Pacific routes" have of routing their traffic via either the Rio Grande or the Union Pacific. All of them have the same rates and privileges when they route via the Rio Grande and all of them have the same rates and privileges when they route via the Union Pacific. Clearly the situation thus presented cannot serve as a basis for a lawful finding of undue prejudice and preference within the meaning of Section 3(1) because the same shippers and receivers are claimed by the report to be unduly prejudiced when they elect to route their traffic over the Rio Grande and unduly preferred when they elect to route their traffic over the Union Pacific. The undue prejudice found against them in the report when they ship over the Rio Grande is due to the claimed undue preference

they receive when they ship via Union Pacific routes at lower joint rates. In other words, shippers and receivers in the northwest area "using, or desiring to use, the Rio Grande routes," may alternatively prejudice or prefer themselves as and when they choose.

Where, as here, shippers have the choice of becoming at once the prejudiced and the preferred, we submit that their election to become "prejudiced" shippers by routing over the Rio Grande when they have the choice of being the "preferred" shippers by routing over the Union Pacific, does not present a case within the meaning of Section 3(1). It requires unequal treatment of two different shippers to make a violation of Section 3(1)—one who is prejudiced and another who is preferred. The disadvantage and injury of the prejudiced shipper must be shown to result to the advantage and benefit of his commercial competitor claimed to be preferred. *The same shipper cannot be prejudiced or damaged by his own preference or profit.* In short, the Commission cannot make a case of undue prejudice against shippers "using, or desiring to use, the Rio Grande routes" by pointing to the fact that they have lower rates when they elect to route their traffic over the Union Pacific, nor by pointing to other shippers in the northwest area who elect to use the Union Pacific routes instead of the Rio Grande routes with its higher combination rates. The very factual situation affords no basis, to say nothing of "a rational basis" for a finding of undue prejudice or for the order based upon that finding. *Miss. Valley Barge Co. v. U. S.*, 292 U. S. 282, 287.

The very word "preference" carries with it the thought of different treatment of two patrons by the same carrier or carriers and the same is true of the words "prejudice," "advantage" and "disadvantage," used in

Section 3(1). In *Dewey Portland Cement Co. v. Allen & E. R. Co.*, 176 I. C. C. 671, the Commission said at page 685:

"Undue prejudice under section 3 of the interstate commerce act ordinarily requires the prejudice suffered by one party to be the source of positive advantage to the one alleged to be preferred and that a competitive relationship exists between the parties concerned. *Boston Wool Trade Asso. v. B. & A. R. R. Co.*, 78 I. C. C. 178, 183."

Among numerous other cases in which the Commission has repeated that rule, are *Hess v. Union Pac. R. Co.*, 237 I. C. C. 121, 126-127; *Illinois Coal Traffic Bureau v. Ahnapec & W. Ry. Co.*, 204 I. C. C. 225, 241; *Barrett Co. & A. T. & S. F. Ry. Co.*, 172 I. C. C. 319; *Evansville Cham. of Com. v. Atchison, T. & S. F. Ry. Co.*, 196 I. C. C. 349, 351; *Welch-Sandler Sand Co. v. Atchison, T. & S. F. Ry. Co.*, 196 I. C. C. 789, 793; and *Fort Smith & W. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 216 I. C. C. 411, 433.

No case can be found in which the Commission has attempted to make out a case of undue prejudice against a shipper by pointing to the same shipper's alleged undue preference, nor is there a case, except the instant one, where carriers have been held guilty of granting an undue or unreasonable preference to shippers located on their lines because they offer lower rates over their routes than the same shippers have over another route. We repeat that the Commission cannot use the situation of these shippers and receivers in the northwest area to make out a case of undue prejudice against them when routing over the Rio Grande, by pointing to the fact that the same shippers enjoy lower rates when they elect to ship via the Union Pacific, and the Commission's finding of a violation of Section 3(1) is null and void.

- (b) Refusal of the Union Pacific and other railroads to equalize availability of transit privileges offered by the Rio Grande with those offered by Union Pacific is not, in law, a violation of Section 3(1) of the Act, and the order requiring such equalization is null and void.

The findings in the Commission's report make it definite and certain that the undue prejudice found therein against shippers desiring to use the Rio Grande is based wholly and solely upon the fact that they cannot take advantage of transit privileges on that line at rates as low as the rates with similar transit privileges are available on the Union Pacific; also that the asserted undue preference of shippers using the Union Pacific is due solely to the fact that they have the same transit privileges that shippers have on the Rio Grande, but at lower rates.

Apart from improvement of the Rio Grande's financial position, the reduction in rates via the Rio Grande required by the order is solely for the purpose of enabling shippers desiring to use the Rio Grande to make use of transit privileges on that line at the same rates they pay when they ship via the Union Pacific. This is made clear at many places in the Commission's report. The report states that the amount of traffic that would be diverted from the Union Pacific by the Rio Grande would depend on the latter's persuasion of shippers and receivers to use its line as an "overhead or bridge route", and upon the Rio Grande's ability to "induce shippers to use transit facilities available on that line" (R. 46). The following language in the report shows more specifically the purpose of the order to equalize the availability of transit privileges on the Rio Grande with those on the Union Pacific (R. 49):

"*Transit.*—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

"The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding."

The report further emphasizes equalization with respect to transit (R. 70):

"For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply."

The following language from the report shows that the primary basis for the order is equalization of transit privileges at points on the Rio Grande with those on the Union Pacific (R. 72):

"As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments west-bound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs east-bound; *who reassign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates,*

together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3(1) of the act." (Italics added.)

Section 1(4) of the Act makes it the duty of every common carrier subject thereto "to provide and furnish transportation upon reasonable request therefor." The "transportation" which common carriers are thus required to furnish is defined in Section 1(3)(a) of the Act as follows:

"The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

The definition does not include transit privileges in the "transportation" that carriers are required to furnish. Indeed, the Commission itself correctly concludes that transit privileges are not "transportation", but are "commercial operations" (R. 48). This Court accepted that view in *B. & O. R. Co. v. U. S.*, 305 U. S. 507, 525.

The Commission finds (R. 73) that the through routes and joint rates required by its order are necessary and desirable in the public interest in order to provide adequate and more economic "transportation", but as we have shown, the "transportation" via the Rio Grande would be the same under the order as it is now, the only difference being that such "transportation" would be at lower rates which the Commission believes

the Rio Grande could use to induce shippers to ship via its longer route for the purpose of exercising "transit privileges" offered by that line. But, as these "commercial operations" are not transportation service performed by railroads, but consist of various manufacturing, processing, grazing, fabrication, storage and other activities which take place while commodities are "stopped" at some point along the railroad and held in possession of the shipper *between* the performance by the railroad of two separate movements or transporting services, they do not fall within the "transportation" which the Act requires carriers to furnish. They are beyond reach of the Commission's power and may not be made the basis of a finding of undue preference and prejudice in violation of Section 3(1) of the Act, or an order requiring through routes and joint rates, and the Commission exceeds its power in ordering equalization of the cost of using the Rio Grande's transit privileges with the Union Pacific routes, for the Commission may not lawfully order carriers to provide or offer more than the Act makes it their duty to furnish. Certainly, the Commission is without power to equalize opportunities offered by different railroads for "commercial operations". In *Interstate Com. Comm. v. Diefenbaugh*, 222 U. S. 42, 46, this Court said, "[t]he law does not attempt to equalize fortune, opportunities or abilities."

In *Central R. R. Co. v. United States*, 257 U. S. 247, this Court enjoined and annulled an order issued by the Commission under Section 3(1) of the Act requiring 23 railroads to remove undue prejudice caused by the refusal of the Central of New Jersey and the Pennsylvania to establish a creosoting-in-transit privilege on their lines at Newark, New Jersey, while at the same time participating in through routes and joint rates with

other carriers in the middle west and south while other carriers offered that transit privilege on their lines.

The purpose of the complaint and of the order there, as here, was to *equalize different railroads* in the matter of transit privileges. There the railroads had equal rates but the Central and Pennsylvania refused to grant transit privileges offered by the other railroads. Here, the Union Pacific routes offer the same transit privileges offered by the Rio Grande, but refuse to join in equal rates to equalize transit opportunities of the Rio Grande with those of the Union Pacific for shippers from or to the northwest area.

At pages 255-256, the Court pointed out that whether a transit privilege is granted or withheld is a policy matter to be determined solely by the railroad on which the transit point is located, and that one carrier is powerless to control such determination by another. This being true, the Court said a carrier that refused to establish transit privileges on its line could not be held responsible for unjust discrimination even though it participated in joint rates with carriers that offered such privileges on their lines, saying at pages 259-260, that:

"If this were not so the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of section 3. What Congress sought to prevent by that section as originally enacted was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any

earlier amendatory legislation has changed in this respect, the purpose or scope of section 3."

If, as in that case, no basis for a finding of unjust discrimination under Section 3 was afforded by the refusal of the Central and Pennsylvania to equalize transit opportunities on their lines with those on connecting lines with which joint rates had already been established; *a fortiori*, no legal basis for a finding under Section 3 is afforded by the Union Pacific's refusal to establish joint rates that short haul it for the purpose of equalizing transit opportunities on the Rio Grande with those on the Union Pacific.

Furthermore, in the instant case the Commission has, without reason or explanation, departed from the norm and principle of its previous decisions with respect to its authority to deal with transit privileges. (See *Sec'y of Agriculture v. United States*, 347 U. S. 645, 653.)

In *Adrian Grain Co. v. Ann Arbor R. R. Co.*, 276 I. C. C. 331, the Commission refused to require the establishment of joint rates for transit privileges via through routes that would short haul the Ann Arbor Railroad. All of the new routes sought in that case were longer than existing routes, which is the identical situation in this case. The Commission there expressed the view that the publication of the sought routes would encourage wasteful and uneconomic transportation and would not give reasonable preference to the originating carrier as required by Section 15(4) of the Act. Granting the Rio Grande's demands in this case would likewise encourage from 200 extra miles to as much as 50 per cent more miles of wasteful and uneconomic transportation in addition to short-hauling Union Pacific 925 miles on traffic it originates.

In *Laclede-Christy Co. v. Akron, C. & Y. R. Co.*, 276 I. C. C. 519, the Commission dismissed a complaint seeking—

“the same through charge on the clay in and the brick out *with transit* at St. Louis as its competitors pay with transit at Mexico, East Mexico, Farber and Vandalia.” (p. 525; Italics added.)

The complainant's disadvantage in transportation costs in that case ranged from \$47 to \$83 per carload more than those of its competitors who had transit privileges at lower rates published by the Gulf, Mobile & Ohio in order “to attract and hold traffic” (p. 524). Finding that longer mileage and greater operating costs—both of which are involved on the Rio Grande—created dissimilarity in transportation conditions with respect to complainant's shipments compared to those of its competitors, the Commission held at page 525:

“It is not within the province of the Commission to disregard transportation conditions and require an adjustment of rates and charges merely for the purpose of *equalizing or minimizing* the advantages and disadvantages of competing shippers growing out of the geographical locations of plants *for the manufacture of [sic] processing of materials in transit.* *Magor Car Corp. v. Delaware, L. & W. D. R. Co.*, 144 I. C. C. 135, 138.” (Italics added.)

The Commission has always held that transit privileges are purely local to the railroad on which the transit point is located, *Concentration of Cotton at New Orleans*, 83 I. C. C. 18, 20, and it held in *Transit Arrangement on Lumber*, 129 I. C. C. 518, at page 520, that:

“Connecting lines can not dictate to the road that alone serves the transit point the manner in which joint rates through that point shall be applied

in conjunction with the transit arrangements, so long as they are not deprived of their long haul. *Concentration of Cotton at New Orleans*, 83 I. C. C. 18; *Transit Privileges on Cotton*, 83 I. C. C. 60."

In *Grain From Mobile and New Orleans Transited in South*, 218 I. C. C. 437, at page 440, the Commission said:

"It is a well-settled principle, however, that the granting or withholding of transit is a matter which may be determined solely by the carrier that serves the transit point. *Transit Privileges on Cotton*, 83 I. C. C. 60; *Transit Privileges on Lumber*, 132 I. C. C. 53; and *Sugar Stored in Transit*, 146 I. C. C. 382. It is clear also that a carrier may not be found guilty of undue prejudice for failing to maintain a transit privilege at points on its line merely because like privileges are in effect at points on the lines of other carriers. *Central R. Co. of New Jersey v. United States*, 257 U. S. 247. In such instances an order requiring the removal of undue prejudice would not permit the carrier an alternative in the method of such removal."

As the carriers comprising Union Pacific routes do not and cannot control either the establishment or cancellation of transit privileges on the Rio Grande or the manner in which rates shall be applied to such privileges, we confidently assert that they have no such legal responsibility for or connection with the alleged disadvantage of shippers using the Rio Grande and its transit privileges as could make out a case of undue prejudice to those shippers or of undue preference of shippers using the Union Pacific within the meaning of Section 3(1). In *Routing Cottonseed to Kansas and Missouri*, 231 I. C. C. 775, at page 779, the Commission held that "a carrier cannot be charged with unlawful prejudice against a community which it does not serve."

- (c) Even if the essential foundation existed, which it did not, for finding a violation of Section 3(1), the facts found by the Commission and the testimony of record do not support or justify the conclusion that the combination rates via the Rio Grande are unduly prejudicial to shippers and receivers in the northwest area "using or desiring to use the Rio Grande routes" for westbound shipments of monuments, and eastbound shipments of livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, and butter and eggs, and unduly preferential of shippers and receivers "using the Union Pacific routes."

The majority of the district court held that the "evidence of preference, advantage, prejudice or disadvantage * * * furnishes no basis for the order under Sec. 3(1)," (R. 164), apparently because "there is no community of interest between the Union Pacific and the Rio Grande" (R. 166).

Circuit Judge Johnsen held that the facts would not permit finding a violation of Section 3(1). He said (R. 178):

"But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3(1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3(1)."

The Commission in many decisions has pointed out facts which must be clearly shown by evidence in order to enable it to find undue prejudice and undue preference between shippers in violation of Section 3(1) of the Act.

In *Hayes Pump & Planter Co. v. Atchison, T. & S. F. Ry. Co.*, 171 I. C. C. 13, it said at page 19:

"However, a mere showing of a difference in rates does not establish the existence of undue prejudice or preference. To justify such a finding a competitive relation between the persons, localities, or descriptions of traffic concerned must also be shown."

In *Archer-Daniels-Midland Co. v. Great Northern Ry. Co.*, 171 I. C. C. 192, the Commission said at page 195:

"Prejudice to be undue and unlawful under section 3 must ordinarily be such that the prejudice suffered by one is a source of positive advantage to another and a competitive relation must exist between the persons or commodities affected."

Definite showing of specific shipments and their origins and destinations must be made to enable the Commission to determine whether one of two competitors is unduly prejudiced, *Kistler Leather Co. v. Baltimore & O. R. Co.*, 171 I. C. C. 669, 673; *Abrasive Co. v. Erie R. Co.*, 183 I. C. C. 103, 106. "Damage by reason of any undue preference which may exist" must be proved. *Alpena Leather Corp. v. Pennsylvania R. Co.*, 185 I. C. C. 106, 108.

Actual competition between the alleged preferred and the prejudiced shippers must be proved before a violation of Section 3(1) can be found. *Dewey Portland Cement Co. v. Alton & E. R. Co.*, 176 I. C. C. 671, 685; *Evansville Cham. of Com. v. Atchison, T. & S. F. Ry. Co.*, 196 I. C. C. 349, 351.

Actual damage through loss of business by reason of unduly prejudicial rates must be proved before a finding can be made that Section 3(1) has been violated, *Barrétt Co. v. A., T. & S. F. Ry. Co.*, 172 I. C. C. 319, 332; *E. Cohn & Son v. Cedar Rapids & I. C. Ry.*, 200 I. C. C. 417, 419; *Illinois Coal Traffic Bureau v. Ahnapee & W. Ry. Co.*, 204 I. C. C. 225, 241; *Alphe Lux Co. v. Reading Co.*, 178 I. C. C. 16, 20.

Volume of movement and origins and destinations of actual shipments must be shown: *Abrasive Co. v. Erie R. Co.*, 183 I. C. C. 103, 106.

The Commission cannot make a valid finding of undue prejudice and preference under Section 3(1) unless there is evidence proving that transportation conditions affecting and surrounding both the prejudicial and preferential rate situations are "substantially similar." *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197. In *Clover Splint Coal Co., Inc. v. Louisville & N. R. Co.*, 197 I. C. C. 276, the Commission said at page 277:

"Before a violation of section 2 of the act can be found, it must appear that the circumstances and conditions are substantially similar. And although section 3 is more comprehensive than section 2 and does not contain the phrase embodied in section 2, 'under substantially similar circumstances and conditions,' nevertheless, it contains words of wider scope, 'in any respect whatsoever,' and as a matter of practical application the thought, if not the words, 'under substantially similar circumstances and conditions,' must be present to the mind in considering under section 3 what preferences or advantages are due or reasonable or are undue or unreasonable." *Board of Trade of Carrollton, Ga. v. Central of Georgia Ry. Co.*, 28 I. C. C. 154. So that it is now well settled that sufficient dissimilarity of circumstances and con-

ditions will prevent what would otherwise be a violation of the statute. See *Ragland Coal Co. v. Ry. Co.*, 115 I. C. C. 147, and cases cited therein."

A finding of "substantially similar" transportation conditions is precluded in this case by the fact recognized by the Commission and found in the report (R. 72):

"There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3(4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred. No such a showing has here been made."

That finding obviously made it impossible for the Commission to make a valid finding of undue prejudice and preference between shippers, for similarity of transportation conditions must be proved by the evidence to justify the latter finding as well as a finding of discrimination.

In view of the Commission's own admission that no such evidence appears in the record, its finding of undue prejudice and preference between shippers is clearly invalid.

The shipper testimony fails completely to meet the requirements laid down by the Commission in its prior decisions.

The record contains no evidence whatever to show that shippers "using the Union Pacific routes" have any preference or advantage whatever over shippers "using, or desiring to use, the Rio Grande routes" unless the dif-

ference in rates constitutes an advantage prohibited by Section 3(1), and the Commission decisions cited above hold that it does not. And, since all of the shippers of traffic to or from the originating or northwest area have equal privilege of routing their traffic via either the Rio Grande or the Union Pacific routes, it is impossible to see how any evidence could show any preference or prejudice to any of them by anything the Union Pacific or Rio Grande is doing.

The record does not show that shippers using or desiring to use the Rio Grande routes have lost business to any competing shipper using the Union Pacific routes, and, indeed, the record contains only the merest general statements that any competition exists between any shippers using or desiring to use the Rio Grande routes with those using the Union Pacific routes. Two or three instances of such general statements appear but are not accompanied by any showing that such alleged competition has resulted in injury, loss or damage to shippers using the Rio Grande routes or in any gain of business by shippers using the Union Pacific routes.

There is no evidence whatever of specific shipments, origins or destinations, and none to show the particular shippers who have the alleged advantage or preference that must be shown to establish the undue prejudice found by the Commission against shippers using the Rio Grande routes.

The assertions we make with respect to the absence or lack of evidence obviously cannot be proved by pointing to any particular page or portions of the record. We cannot point to pages of the record where testimony is not. If counsel for defendants deny or dispute our assertions that the record is lacking in evidence in the respects men-

tioned above, then it is their burden to point to the pages of the record on which they contend that such evidence may be found.

While the Commission's report labors to make it appear that shippers and receivers in the "excluded territory" may not have made sales of their products at some points in the southwest because of so-called "pocket-markets," the report does not suggest that any shipper located either in the "excluded territory" or on the Rio Grande has ever lost a sale or any business to any alleged competitor located on or using the Union Pacific. In fact, shippers and receivers in the "excluded territory" who are "using, or desiring to use, the Rio Grande routes" being themselves located on the Union Pacific, could not make such contention, for their rates and privileges are identical to those available to whatever competitors, if any, they might have on the Union Pacific. The report states (R. 49) that in some instances a dealer in building materials located at Salt Lake City has had to "forego business" as far east as Glenwood Springs, Colorado, on the Rio Grande "because of the rate situation," but the discussion of that shipper's situation is clearly irrelevant for the Commission does not find a violation of Section 3 with respect to building materials. Since building materials are not included among the commodities specified in the order in connection with the required through routes and joint rates, it is not understandable why the Commission devotes discussion to that shipper's situation unless it is merely an effort to bolster the report by discussing irrelevant and immaterial circumstances. The same is true of the discussion of farm machinery (R. 50), of wheat (R. 59), and of lumber (R. 60),

(d) The finding that the substantial differences in transportation conditions found in the report to exist in hauls over the Union Pacific and over the Rio Grande via Ogden between the "excluded territory" and points north and west of the southern and eastern boundaries of Kansas, the Missouri River and the lines of the Union Pacific and Chicago and North Western Railroads from Omaha to Chicago "become relatively insignificant" and that "transportation conditions are substantially similar" for hauls between points in the "excluded territory" and points south and east of the line described, is arbitrary, erroneous, contrary to law and the evidence.

The findings indicated in the above heading relate to the Commission's Section 3(1) finding of undue prejudice to shippers using the Rio Grande and undue preference to those using the Union Pacific.

As shown by decisions cited above, the Commission may not make a finding of undue prejudice and preference without finding that circumstances and conditions are substantially similar with respect to the shippers alleged to be preferred and the shippers alleged to be prejudiced by his competitor's alleged preference.

In *Kauffman Milling Co. v. Mo. Pacific Ry. Co., et al.*, 4 I. C. C. 417, the Commission succinctly stated the rule at pages 435-436:

"The statute contemplates and clearly provides for dissimilar conditions that may affect the making of rates by carriers, and in a proper case of that nature it is no less the duty of public tribunals to rec-

ognize dissimilarities that justify exceptional rates than to apply the general principles of the law."

The principle of the decisions by the Commission was declared by this Court early in the history of the Commission. In *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197, the Commission sought to enforce an order requiring railroads to cease and desist from charging any less or different rate for transportation of imported goods than for domestic goods. The Commission was of the view that the fact of importation did not create a dissimilar circumstance, or that if it did the Commission was without authority to consider such dissimilarity. At page 217 the Court held that, "[i]n so construing the act we think the Commission erred." There can be no question, therefore, that where substantial differences or dissimilarities in circumstances and conditions exist a finding of undue preference and prejudice cannot be justified, nor may the Commission prescribe rates which ignore such dissimilar circumstances.

Demonstrating the dissimilar transportation conditions in the instant case, the report recites the following facts and conclusions (R. 61-62):

"The Union Pacific operates about 9,724 miles of railroad serving over 1,700 points in 13 States. It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte, Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over \$600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct

routes, the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

"Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity, and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

"The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 per cent and west-bound 1.55 per cent. The Rio Grande's maximum grade is 2 per cent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal yard services."

Concerning the Rio Grande the Commission finds (R. 70):

"Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock, Western District Rates*.

supra, and *W. H. Bantz Co. v. Abilene & S. Ry. Co.*,
216 I. O. C. 481, 486.

In the language quoted next below, the Commission concludes that there are substantial differences or dissimilarities between transportation conditions over Union Pacific routes and those over Rio Grande routes via Ogden; and its order, seemingly on the ground that the hauls are shorter, purports to give effect to the dissimilarities to and from points in the territory roughly north and west of the southern and eastern Kansas borders, west of cities located on the Missouri River and north of points on the line of the Chicago and North Western Railroad from Omaha to Chicago and the upper peninsula of Michigan. But the Commission then proceeds to ignore these same dissimilarities to and from points in the area south and east of the line just described, saying that, "spread over hauls of such great length," the dissimilarities "become relatively insignificant" and that, therefore, as between such points "the transportation conditions are substantially similar" (R. 71).

"We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths

that, considered as a whole, they *become relatively insignificant*. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar." (Italics added.)³⁵

Thus, by mere "declaration" and "an artificial use of words," *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545, the Commission seeks to overcome and escape the very dissimilarities in circumstances and conditions which it finds in the "more onerous" operating conditions on the Rio Grande, and to overcome a complete absence of evidence concerning transportation conditions elsewhere than on the line of the Rio Grande and a portion of the Union Pacific line.

Under the theory and requirements of the order, the admitted dissimilarities and "more onerous" operating conditions of the Rio Grande would vanish and transportation conditions would become "substantially similar."

35 Circuit Judge Johnsen's dissent condemns this arbitrary action of the Commission, saying (R. 176-177):

"All that the Commission says, in brushing aside the transportation differences which I have set out * * * is that, when they are spread over hauls of such great lengths as are here involved they become relatively insignificant."

* * * * *

"I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1524 miles (Chicago), the elements of difference which I have set out are so 'relatively insignificant' as to be entitled to be ignored on the question of whether 'more economic transportation' is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportation and service differences existing, as related to the question of 'more economic transportation' under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without establishment of the reality of that horizon for lumping purposes."

for example on the Union Pacific somewhere within the 19 miles between Omaha, Nebraska, where the joint rates *are* required, and Elkhorn, Nebraska, where the joint rates are *not* required.

The dissimilarities in transportation conditions affecting the traffic in question are shown by facts recited in the report to be due entirely to unfavorable and more onerous conditions on the Rio Grande between Ogden and Denver compared to operating conditions on the Union Pacific between McCammon, Idaho, and the Missouri River. Excepting this comparison between conditions on the Rio Grande and the Union Pacific, there is no evidence whatever in the record concerning or comparing transportation conditions on other parts of the Union Pacific or routes in which it participates with other carriers. Therefore, there is not a scintilla of evidence to justify the conclusions (R. 72) that the proved dissimilarity of conditions on the Rio Grande and the Union Pacific "become relatively insignificant" and that "transportation conditions are substantially similar" between points in the northwest area and points south and east of Kansas, the Missouri River and the Chicago and North Western to Chicago.

The conditions on the Union Pacific and the Rio Grande which give rise to the substantial differences found by the Commission in transportation conditions are local to the Rio Grande and the Union Pacific, and those conditions cannot be avoided, eliminated, diluted or made to disappear by the arbitrary and erroneous statement that they "become relatively insignificant" for hauls to the southern and eastern part of the country. The dissimilar conditions are permanently fixed by nature, and even the magic wand of the Commission's "expertise" cannot

make them disappear. No expert can wipe out the "more onerous" Rio Grande location in the Rocky Mountains. There is no escape from the dissimilarities in either long hauls or short hauls, for traffic moved over the Rio Grande must encounter its "more onerous" operating conditions regardless of the length of haul northwest of Ogden or east of Denver. The Commission is without authority to ignore or eliminate these dissimilarities by "spreading" them "over hauls of such great lengths," and the attempt to do so is plainly arbitrary and contrary to the evidence which proves the admitted existence of the dissimilarities.

The Commission's attempt to avoid giving effect to the dissimilarity it found, by the simple expedient of making distance alone controlling in finding undue prejudice, is contrary to law. Even where other relevant circumstances are equal, "mere distance is not necessarily a determining factor—indeed the statute itself (section 4) recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road," *Louis. & Nash. R. R. v. United States*, 238 U. S. 1, 12. *A fortiori*, where, as in the instant case, the Commission has expressly found dissimilar conditions in the "more onerous" operating conditions of the Rio Grande, it is precluded from using distance alone as a means of controlling and eliminating, neutralizing or escaping the dissimilar conditions.

In *Wilhoit v. Missouri, Kansas & Texas Ry. Co.*, 12 I. C. C. 139, at page 140, the Commission held:

"Distance is something of a factor in the determination of the reasonableness or unreasonableness of a rate, but to permit it to be a sole or controlling factor would be to introduce² discrimination, which would create chaotic commercial conditions under

which irreparable injury would be done to individuals, firms, and communities without any compensating good resulting to the people or the commerce of the country as a whole."

If the Commission were correct in the method used in this case to eliminate or ignore differences in transportation conditions, then any difference in conditions no matter how great could be disregarded if the Commission says the hauls which encounter the differences are long enough. By this arbitrary process the Commission would make the question whether transportation conditions are dissimilar depend entirely upon distance and would disregard the physical and other characteristics which create the differences. Thus, the Commission would change the law and make itself the sole judge as to whether dissimilarities in transportation conditions must be given effect in a particular case. This it may not do. *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197.

The dissimilarities correctly found by the Commission are beyond control of or correction by the carriers or the Commission and in the face of them a finding of undue prejudice may not be made. In *East Tenn. & Ry. Co. v. Interstate Com.*, 181 U. S. 1, at page 18, this Court held:

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."
(Italics added.)

Moreover, even if the Commission were legally sound in its theory that it may ignore dissimilar transportation

conditions when "spread over hauls of such great length," its order does not adhere to that theory, as shown by the following examples:

Joint Rates Via Rio Grande Not Required.

From	To	Miles
Seattle, Wash.	Galena, Kansas	2,440.8
do	Milwaukee, Wis.	2,699.3
do	Sault Ste. Marie, Mich. .	3,044.5

Joint Rates Via Rio Grande Required

From	To	Miles
Brigham City, Utah	Omaha, Nebraska	1,187.7
do	Kansas City, Mo.	1,267.7
do	St. Joseph, Mo.	1,269.7
McCammon, Idaho	Omaha, Nebraska	1,255.0
do	Kansas City, Mo.	1,352.0
do	Tulsa, Okla.	1,427.0

Thus, in applying its theory, the Commission ignores the "more onerous" transportation conditions of the Rio Grande on hauls to markets on the Missouri River that are less than one-half the length of hauls to Sault Ste. Marie, Michigan, and other points where the dissimilar conditions are given effect by *not* requiring the joint rates to such points.

These inconsistent and absurd situations compel the conclusion that the Commission felt it could escape, avoid or nullify the effect of the Rio Grande's "more onerous" transportation conditions to the better markets and traffic centers in the east by giving "lip service" to the same conditions on hauls to the less important traffic areas and centers.

We submit that the process, method or reasoning by which the Commission concludes that the very dissimilarity

ties it necessarily finds to exist in transportation conditions become substantially similar for hauls between the "excluded territory" and the southern and eastern part of the country is irrational, arbitrary, erroneous and contrary to the facts and law, and the order based thereon is null and void.

7. **There is no evidence at all to support or justify the finding that maintenance by the Union Pacific of joint rates with the Bamberger Railroad south of Ogden while refusing to participate in like rates with the Rio Grande discriminates against the latter in violation of Section 3(4) of the Act.**

The Bamberger Railroad operates between Ogden and Salt Lake City, Utah, and serves intermediate points, most of which are also served by both the Rio Grande and Union Pacific. Union Pacific's joint rates and through routes with the Bamberger have been in effect many years, and its relations with that line are the same as those between the Bamberger and the Rio Grande.

The report correctly states (R. 72) that to support a finding of discrimination under Section 3(4) of the Act it must be shown that transportation conditions over the route alleged to be discriminated against are no less favorable than over the route said to be preferred, but proceeds to find that the Union Pacific discriminates against the Rio Grande by refusing joint rates with it while maintaining them with the Bamberger Railroad.

No evidence whatever was submitted concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande. When an order is "rendered without any evidence whatever to support it" it must be

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enjoined and annulled; *Florida East Coast Line v. United States*, 234 U. S. 167, 185, 188.

In the absence of any evidence, the Commission attempts to support its finding by saying "there is no apparent reason" why similar arrangements should not apply with the Rio Grande and that "it appears that there is no important dissimilarity" between transportation conditions on the two roads (R. 73).

Even if the Commission had knowledge of facts that would prove "no important dissimilarity", such facts would not support its finding because they are not in evidence. "Facts conceivably known to the Commission but not put in evidence will not support an order," *Chicago Junction Case*, 264 U. S. 258, at page 263. "Nothing can be treated as evidence which is not introduced as such," *U. S. v. Abilene & So. Ry. Co.*, 265 U. S. 274, at page 288.

The burden was on the Rio Grande to submit evidence proving similarity of transportation conditions. Its failure to do so cannot be overcome by what is *not shown* or what might *appear* to the Commission outside the record. The Commission is without power to make a finding without evidence, and an order based on such finding is void. *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88; *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541.

V.

The Order Should be Annulled and set Aside Because the Commission Acted Arbitrarily and Unlawfully With Respect to the Essential Matters Discussed Under This Heading.

1. Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and, in ordering through routes and joint rates on the theory that because shippers had intervened, the Rio Grande's complaint became a shipper complaint.

The Rio Grande alleged in its complaint that combination rates via its line "are unjust, unreasonable and discriminatory" and deprive "the public and the complainant [Rio Grande] of the use of available and reasonable through routes at reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest."

The Rio Grande did not allege that the rates via its line unduly prejudiced or unduly preferred any shippers, nor did it allege that through routes via its line were necessary or desirable in the public interest, or that existing routes of the Union Pacific and other railroads were unreasonably long compared to routes that could be made via the Rio Grande, or that through routes and joint rates via the Rio Grande to and from the northwest area were needed to provide adequate and more efficient or more economic transportation.

The allegation that its own rates were unreasonable is mere surplusage, for obviously a carrier may not be heard to complain against its own rates. Likewise, the Act accords no right in the Rio Grande to through routes or joint rates, and it does not lie with the Rio Grande to

allege or rely upon the "public interest" or discrimination, undue prejudice or undue preference between shippers. In *Interstate Comm. Comm. v. D., L. & W. R. R.*, 216 U. S. 531, this Court annulled and enjoined an order of the Commission because it granted relief to a railroad under a provision of the Act which gave only shippers a right to complain. In *Interstate Comm. Com. v. Chi. R. I. & Pac. Ry.*, 248 U. S. 88, the carriers contended that an order of the Commission which they sought to enjoin was unlawful because it would foster and build up particular localities in production and distribution to the detriment of other persons and localities. At page 109, the Court rejected this contention, saying:

"That the [railroad] companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clarke v. Kansas*, 176 U. S. 114, 118; *Smiley v. Kansas*, 196 U. S. 447."

Shippers had intervened in that case as in this case, but the Court said, "[i]t is doubtful if they are properly here, or rather were properly permitted to intervene." In *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, at page 149, this Court held that undue discrimination against shippers "was not a matter of which the railways could complain."

Thus, not only was there no issue of undue prejudice against shippers or the "public" in this case, but there was also the inability or disability of the Rio Grande to raise such issues.

The only issue which the Act gives the Rio Grande the right to raise on complaint to the Commission against

other railroads is the issue of discrimination or undue prejudice against it under the provisions of Section 3(4) which declares that carriers "shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

As shown above, the Rio Grande did ~~not~~ complain that rates via its line were "discriminatory" against it, but the Commission held that the evidence failed to prove discrimination against the Rio Grande (except at points on the Bamberger Railroad), saying that (R. 72):

"There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3(4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred. No such showing has here been made."

The Commission found (R. 73) that rates via the Rio Grande on the commodities specified in the order are "unjust and unreasonable" for the commodities named in the order, but this finding affords no legal basis whatever for ordering through routes and joint rates, *Thompson v. United States*, 343 U. S. 549, nor would a legal basis for such order have been afforded even if the Commission had found discrimination against the Rio Grande under Section 3(4) of the Act. *Texas & Pacific Ry. v. U. S.*, 289 U. S. 627, 650.

The Commission agreed that the Rio Grande, being a railroad, could not raise an issue under Section 3(1) of the Act of undue preference and prejudice among

shippers (R. 33), and as we have said, the Commission held that the evidence failed to prove discrimination against the Rio Grande under Section 3(4), (except as to points on the Bamberger Railroad which, of course, would afford no legal basis for the order the Commission issued but would justify only an order that discrimination against the Rio Grande cease and desist at those points).

In these circumstances, the Commission clearly should have dismissed the Rio Grande's complaint. Its authority was "to investigate the matters complained of," Section 13(1), and not to transform the case into a shipper case.

However, the Commission proceeded arbitrarily and erroneously to treat the case as if it were the complaint of shippers whose rights under the Act are totally different from and unrelated to the rights of the Rio Grande. Despite the fact that it permitted intervention of shippers only upon condition that their intervention and participation would not "unduly broaden the issues raised in the complaint" and regardless of its own holdings and the authorities cited above that a railroad may not plead or rely upon the rights of shippers or the public, the Commission held that the intervention of shippers raised an issue of undue preference and prejudice under Section 3(1) of the Act and (R. 33), that testimony of shippers raises "a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities" (R. 69).

Having thus arbitrarily created and set up a new and different case by substituting intervening shippers for the Rio Grande as complainant and injecting issues which the Rio Grande's complaint did not and could not

raise, the Commission concluded that through routes and joint rates via the Rio Grande on the specified commodities are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation," and that the combination rates via the Rio Grande on the specified commodities are and for the future will be "unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes" (R. 73).

To treat the case as a shippers' complaint against undue prejudice, or as a "public interest" case involving through routes was not merely to unduly broaden the issues raised by the Rio Grande's complaint, in violation of Rule 72(e) of the Commission's General Rules of Practice, but to raise new issues involving wholly new and different cases under other and different provisions of the Act.

Counsel for the Rio Grande has argued that the shippers who intervened in support of its complaint "have the same status as they would have as original complainants." The obvious purpose of that contention was to induce the Commission to base its order upon rights of shippers and the public if it found, as it did, that the evidence did not sustain the Rio Grande's own case. But the cases cited by the Rio Grande have no bearing on the position of intervenors generally or of those who intervened before the Commission in support of the Rio Grande. The cases are *Chicago Junction Case*, 264 U. S. 258, and *Youngstown Co. v. U. S.*, 295 U. S. 476. Neither case has any bearing upon the status or rights of intervenors in proceedings before the Commission. Both were suits under the special jurisdictional and procedural act

of Congress, invoked in the case at bar, to enjoin and annul orders of the Commission. In those cases it is made plain that the right of an intervenor in such suit rests squarely upon the express provision of the special act of Congress declaring that the Commission and any party to a proceeding before the Commission may, as of right, become a party to "any suit wherein is involved the validity of such order," 264 U. S. 267. In *I. C. C. v. Oregon-Washington R. Co.*, 288 U. S. 14, this Court, again because of the special authorization by the same special Act of Congress, held that the Commission, having intervened as a defendant in the district court, could appeal to this Court after the Attorney General of the United States had refused to appeal, since the statute expressly granted authority to such intervenor "to prosecute, defend or continue the proceeding unaffected by the action or non-action of the Attorney General," 288 U. S. 24.

Intervention "is not an independent action, but is ancillary and supplemental to the existing litigation" and must "be in subordination to, and in recognition of, the propriety of the main proceeding," *Adler v. Seaman*, 266 F. 823, 832 (8th C. C. A.).

"* * * when a person, not a party to a pending suit, who is interested in its subject-matter, desires, for his own protection, to assert his independent rights and raise new issues, he must do so by an original bill," *Leaver v. K. & L. Box & Lumber Co.*, 6 F. 2d 666, 667.

"* * * where the intervener joins either plaintiff or defendant in resisting the claims of the other side, he is not entitled to enlarge the issues," *DeSousa v. Crocker First Nat. Bank*, 23 F. 2d 118, 122.

By confusing and substituting for alleged rights of the Rio Grande, those of its solicited and procured shippers and treating the case as a shipper and public interest complaint, the Commission has given the Rio Grande a large part of its demands, even though it was unable to find from the evidence that the Rio Grande had sustained the allegations of its complaint. By this arbitrary action the Commission also circumvents and evades the provision in Section 15(4) which prohibits it from compelling through routes and joint rates to help a carrier meet its financial needs, and would succeed in severely short-hauling the Union Pacific and other railroads, which it found itself unable to justify upon evidence submitted by the Rio Grande in support of its own complaint and upon the only issues it could raise.

The Commission's effort to evade or circumvent the restrictions of Section 15(4) by resorting to sections of the Act which afford rights to shippers or the "public" and thus to divert traffic from one route to another is thoroughly condemned by this Court's decision in *Thompson v. United States*, 343 U. S. 549, at pages 559-560. Such "tinkering with through routes" by the Commission is prohibited, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575.

2. The Commission acted arbitrarily and unlawfully in failing and refusing to give any effect to the requirement in Section 15(4) that reasonable preference be given to the originating carrier.

One of the mandates in Section 15(4) to the Commission is—

"That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses

(a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

There is nothing in the report to indicate that the Commission gave the slightest recognition to this statutory mandate. Yet, the report shows that 101,476 carloads *originated* in 1948 on the Union Pacific in the "excluded territory." Of the total traffic, 157,762 carloads originated and terminated on the Union Pacific that year, 46 per cent originated or terminated on 2,913 miles of Union Pacific branch lines in that territory. Of the east-bound tonnage for that year, 50,349 carloads or 43 per cent of the total were products of agriculture, including those specified in the order (R. 45). The report shows (R. 62) that the 2,913 miles of branch lines constitutes more than 50 per cent of the total of 5,606 miles of line of the Union Pacific in that territory and that Union Pacific has invested over \$600,000,000 in the routes that would be affected by the diversion of the traffic to the Rio Grande. The unusual proportion of branch line mileage was obviously constructed for the purpose of developing and *originating* traffic in this essentially agricultural area in order to obtain a long main-line haul. The east-bound commodities which would be diverted to the Rio Grande under the Commission's order are agricultural products moving under sub-normal and depressed rates (R. 67), and it is inescapable that the effect of such diversions will necessarily tend toward curtailment of service generally and abandonment of the feeder branch lines on which 46 per cent of the total traffic originates and terminates.

The Commission also ignores the fact that, of the total eastbound movement of 6,473 carloads of animals and animal products in 1948 from Idaho, Montana, Oregon and Washington via the Union Pacific, practically

all of which terminated in the northern half of the eastern half of the United States, 5,094 carloads originated on the Union Pacific in Idaho and Montana and that line would receive an extremely short haul and very little revenue if the movement was via Ogden with the Rio Grande. The Commission further ignores the fact that 61 per cent of all traffic originating on the Union Pacific in Idaho is loaded at branch line stations and incurs very high gathering costs ranging from \$18.99 to \$106.12 per car (V. I. 849; original I. C. C. Ex. 27).

These facts demonstrate the reasons for and the fairness of the legislative mandate requiring the Commission in compelling through routes that short haul a carrier to give reasonable preference to the carrier that originates the traffic. The necessity of revenues from main line movement of such branch-line traffic is too plain for argument unless the Commission is sympathetic with a policy that potentially forces branch line abandonments and weakening of the Union Pacific financially. Such necessity for revenues and continued maintenance of branch lines clearly must be weighed and balanced against the pretended desire of a few shippers for routes which would divert the traffic to the Rio Grande so they may re-consign or take advantage of transit privileges while the traffic is on that line. The Commission has clearly ignored the mandate to give reasonable preference to the Union Pacific in these circumstances, but instead has based its order entirely upon the pretended desire of the few shippers who supported the Rio Grande. It has departed from the rule laid down by this Court that "both interests should be considered and a fair balance found." *Pennsylvania R. Co. v. U. S.*, 326 U. S. 588, 593.

The failure of the Commission to give any preference to the Union Pacific and other carriers that originate

the traffic is plainly arbitrary and contrary to the statutory mandate that it shall give reasonable preference to the originating carriers. Its order based on such arbitrary and erroneous action is void.

3. The order should be enjoined and set aside because of its uncertainty, indefiniteness, and conflicting requirements, and because the Commission has exceeded its authority by using its through routes power under Section 15(3) and (4) to require a rate reduction under Sections 1 and 15(1) and to remove undue prejudice and discrimination under Section 3(1) and (4), and to equalize rates via the Rio Grande with rates of the Union Pacific routes.

The Court will not sustain the order if it, together with the report, is found to be indefinite or that its requirements are conflicting or if the report fails to make clear and specific the precise grounds on which the order rests and the exact requirements which it purports to make. *American Express Co. v. Caldwell*, 244 U. S. 617, 627; *Georgia Comm. v. United States*, 283 U. S. 765, 770-771, and *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, in which the Court, in concluding to enjoin the Commission's order in that case and in discussing the uncertainty and conflicting inferences of the report, held at pages 510-511:

"The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasijurisdictional findings of an administrative agency. *Beumont, S. E. & W. Ry. Co. v. United States*, 282 U. S. 74, 86; *Florida v. United States*, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

The first paragraph of the order (R. 21) recites that the Commission has found:

"* * * (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the north-west area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination."

The second paragraph of the order requires that "the defendants named in the complaints" cease and desist;

"* * * (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph."

The third paragraph of the order requires "said defendants, and the complainant" (Rio Grande) to establish through routes as described therein, and joint rates "the same" as those maintained over the lines of the Union Pacific through Wyoming.

The fourth paragraph of the order requires "said defendants" to establish and—

"* * * to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue

prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof."

Uncertainty and vagueness of the order lie in the fact that although, as just indicated, the railroads, including the Rio Grande, are required to establish via the Rio Grande through routes and joint rates "the same" as joint rates applicable via Union Pacific routes through Wyoming, yet the next paragraph of the order further requires "said defendants" to establish rates "which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof." It cannot be discerned from the order whether the latter rates shall also be "joint rates" or local rates, or what the level of rates required to prevent undue prejudice, preference and discrimination shall be. One is left to guess whether the joint rates required in connection with the through routes via the Rio Grande will prevent and avoid undue prejudice, etc., or whether that shall be accomplished by publishing rates other than or different from the joint rates required to be established in the public interest in connection with the required through routes.

Clearly, an order of such uncertainty and indefiniteness should not be sustained in view of the fact that Section 16(8) of the Act penalizes railroads and their officers \$5,000 for each day they fail to comply with what they must guess or presume that the order requires.

If it be presumed that unreasonableness of the local rates and undue prejudice caused by them will be cured by publishing the joint rates required in connection with the through routes prescribed in the third paragraph of the order, then it results that the Commission has seized upon its through routes power under Section 15(3) and

(4) to prescribe the remedy for rates found unreasonable under Section 1 and 15(1), and for undue prejudice and discrimination found under Section 3(1) and (4).

Any ground that might have existed for contending that the Commission could seize upon its through route power to compel the exact remedy it desires for violations of other provisions of the Act was wiped out when Section 15(3) was amended in 1910. As originally enacted in 1906, Section 15(3) read (34 Stat. L. 590, Sec. 4):

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through rates shall be operated, *when that may be necessary to give effect to any provision of this Act*, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line." (Italics added.)

The italicized language was deleted in enacting the 1910 amendment (36 Stat. L. 552, Sec. 12). And see *Thompson v. United States*, *supra*, concerning the independent, separate and special purpose of the Commission's through route power.

That the Commission may not so commingle and confuse separate and independent provisions of the Act or seize upon its powers under one provision indirectly to obtain the result it can not attain by use of its direct powers under the provision which confers its basic authority has been thoroughly and sufficiently demonstrated earlier in this brief at pages 97-107 and to avoid repe-

tition we respectfully request consideration of that discussion in connection with the contention here made with respect to the Commission's arbitrary and erroneous action resulting from such misuse and abuse of its statutory powers:

4. The Commission acted arbitrarily and contrary to law in refusing to give weight and effect to evidence showing that diversion to the Rio Grande of any substantial part of the traffic it seeks would result in wasteful transportation and economic waste, and in serious detriment to Union Pacific service and its employes, to certain other railroads and their employes, to numerous communities, and would do violence to the National Transportation Policy.

The Commission is without power to compel through routes and joint rates without first finding that they are necessary or desirable "in the public interest." In *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, this Court, in discussing "public interest" as used in the Transportation Act, 1920, said at page 23: "[t]he public interest is served by economy and efficiency in operation," and, at page 25, that the purpose of Congress in granting by that Act power to the Commission to do specified things in the "public interest" with the ultimate aim of insuring adequate transportation service, was directly related—

"* * * to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities; * * *"

In *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, at page 277, in construing the 1920 Act, the Court said:

"By that measure, Congress undertook to develop and maintain, for the people of the United

States, an adequate railway system. It recognizes that *preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern*; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that *competition between carriers may result in harm to the public as well as in benefit*; and that *when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss*. See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331. *The Act sought, among other things, to avert such losses.*" (Italics added.)

The Commission has heretofore adhered to its own rule that in determining questions involving "public interest" it must give consideration to probable detrimental effects as well as alleged benefits and determine "whether the probable benefits overbalance the probable injuries," *Chicago, B. & Q. R. Co. Control*, 271 I. C. C. 63, 146. In *Chicago, R. I. & G. Ry. Co. Trustees Lease*, 233 I. C. C. 21, 25, the Commission emphatically held that:

"* * * the welfare of the employees affected is one of the matters of public interest which we must consider in proceeding under section 5(4). * * *"

and this holding was long before there was any specific requirement in Section 5(4) (now 5(2)(f)) that the welfare of employees be considered. The Commission's order in that case was sustained by this Court in *United States v. Lowden*, 308 U. S. 225, in which the Court said at page 240:

"If we are right in our conclusion that the statute is a permissible regulation of interstate com-

merce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted."

Probable detrimental or injurious effects upon the public at large as well as those more immediately concerned, is decisive of Commission action in many cases. *Chicago, B. & Q. R. Co., Control*, 271 I. C. C. 63, 165; *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266; *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127; and *Pacific Intermountain Exp. Co.—Control and Purchase*, 57 M. C. C. 341.

The "National Transportation Policy" which is serving as a guide to the Commission in interpreting and applying the Act in particular cases, is also a directive to the Commission. It states:

"All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Under the directives of that policy, the burden was upon the Rio Grande to prove to the Commission that granting its full demands would, among other things: (a) Promote safe, adequate, economical and efficient service; (b) Foster sound economic conditions in transportation and among the several carriers; (c) Encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; (d) Encourage fair wages and equitable working conditions; (e) Develop, coordinate and preserve a national transportation system adequate to meet all needs, including national defense.

The Rio Grande did not undertake to submit such proof, but, in the light of the foregoing principles and controlling court decisions, evidence was submitted to the Commission by those who opposed the Rio Grande which showed the transportation and economic waste and the disastrous results upon Union Pacific revenues, service over its routes, and drastic adverse economic effects upon its employees and those of certain other roads, and upon communities served by them, if the Rio Grande succeeded in diverting to its line the entire volume or any substantial part of traffic claimed by it as its "potential". The Commission's report summarizes some of this evidence as follows (R. 65-66):

"Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to \$49,880,000 yearly.

"Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (a) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (b) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (c) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of

\$5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

"Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed at 5,144, with a total loss of wages of \$21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

"The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes."

But, instead of giving weight and effect to these matters, the Commission plainly sought to evade them.

For example, the report states that there is no specific provision in Section 15(3) or (4) requiring that the welfare of the employees be protected in connection with an order compelling through routes, despite the fact shown above that, regardless of the absence of such specific requirement, the Commission was sustained by this Court in holding that the welfare of employees is a matter of "public interest" which it must consider. *United States v. Lowden, supra*. The Commission next attempts to escape consideration of these matters by saying that it is impossible upon the record to estimate how much traffic might be diverted to the Rio Grande if joint rates were required on all the traffic, or under the terms of its order. "To refuse to consider evidence introduced" or to refuse to decide "in accordance with it" is "arbitrary action," *Chicago Junction Case*, 264 U. S. 258, 265. "Facts and circumstances which ought to be considered must not be excluded," *Morgan v. United States*, 298 U. S. 468, 480.

The Commission's evasion of probable detrimental consequences of its order by asserting its inability to find definitely or to estimate accurately the amount of traffic that might be diverted to the Rio Grande, as well as its statements which imply that little or no traffic will be diverted to the Rio Grande unless its solicitors can persuade and induce shippers to use transit privileges offered by that line in connection with bridge traffic, are diametrically opposed to its ultimate conclusion that the Rio Grande route is "necessary and desirable in the public interest, in order to provide adequate and more economic transportation." If the Commission was unable to ascertain from the record that the Rio Grande route is needed for the movement of a substantial volume of traffic, then there could be no basis for its ultimate conclusion that the route is "necessary" and the order falls

for lack of supporting findings that justify or afford a rational basis for it. The conclusion that the Rio Grande route is "necessary" inevitably implies that a substantial volume of traffic will be diverted over it. The Commission was under the inescapable duty to weigh the injurious and detrimental effects of its order against its expected benefits and to find "a fair balance", *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, 593.

If the required through routes and joint rates are necessary "in the public interest" as the Commission has found, then under the decisions cited above, the same "public interest" required the Commission to weigh the adverse effects as well as alleged benefits and to determine "whether the probable benefits overbalance the probable injuries", *Chicago, B. & Q. R. Co. Control*, 271 I. C. C. 63, 146. In failing and refusing to do so, the Commission acted arbitrarily and unreasonably, and for this reason, in addition to others discussed herein, its order is void.

CONCLUSION

For the reasons stated and discussed above, the Commission's order is unlawful and void in its entirety. The judgment of the district court in Numbers 117 and 119, enjoining and annulling the order in part, should be affirmed and its judgment in Number 118, sustaining the validity of the order in part, should be reversed and the case remanded to the district court with direction to issue the injunction and relief prayed by the plaintiffs in that court.

Respectfully submitted,

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PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the *15th* ~~7th~~ day of March, 1956, I served, on behalf of all Appellants herein, copies of the foregoing brief on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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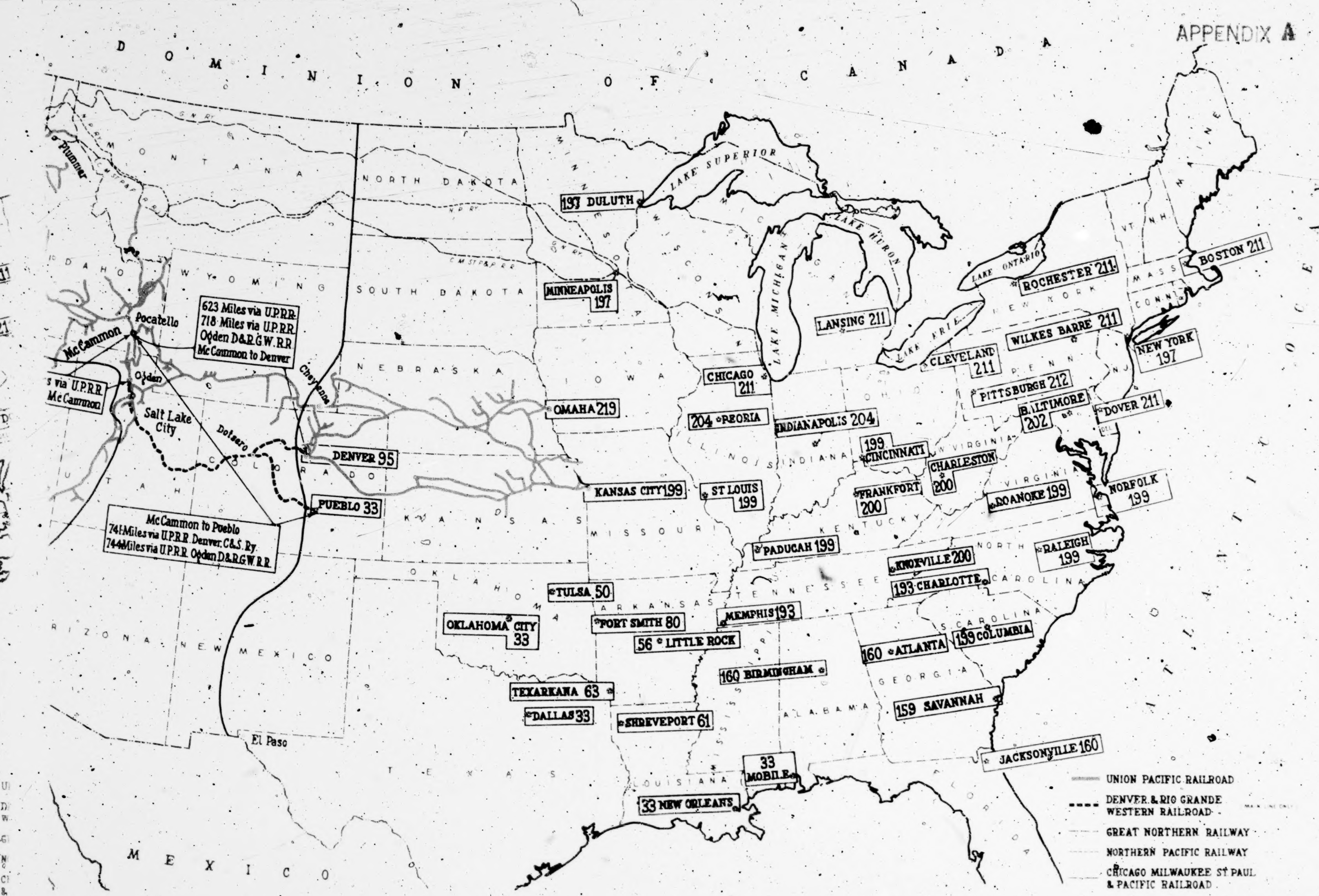
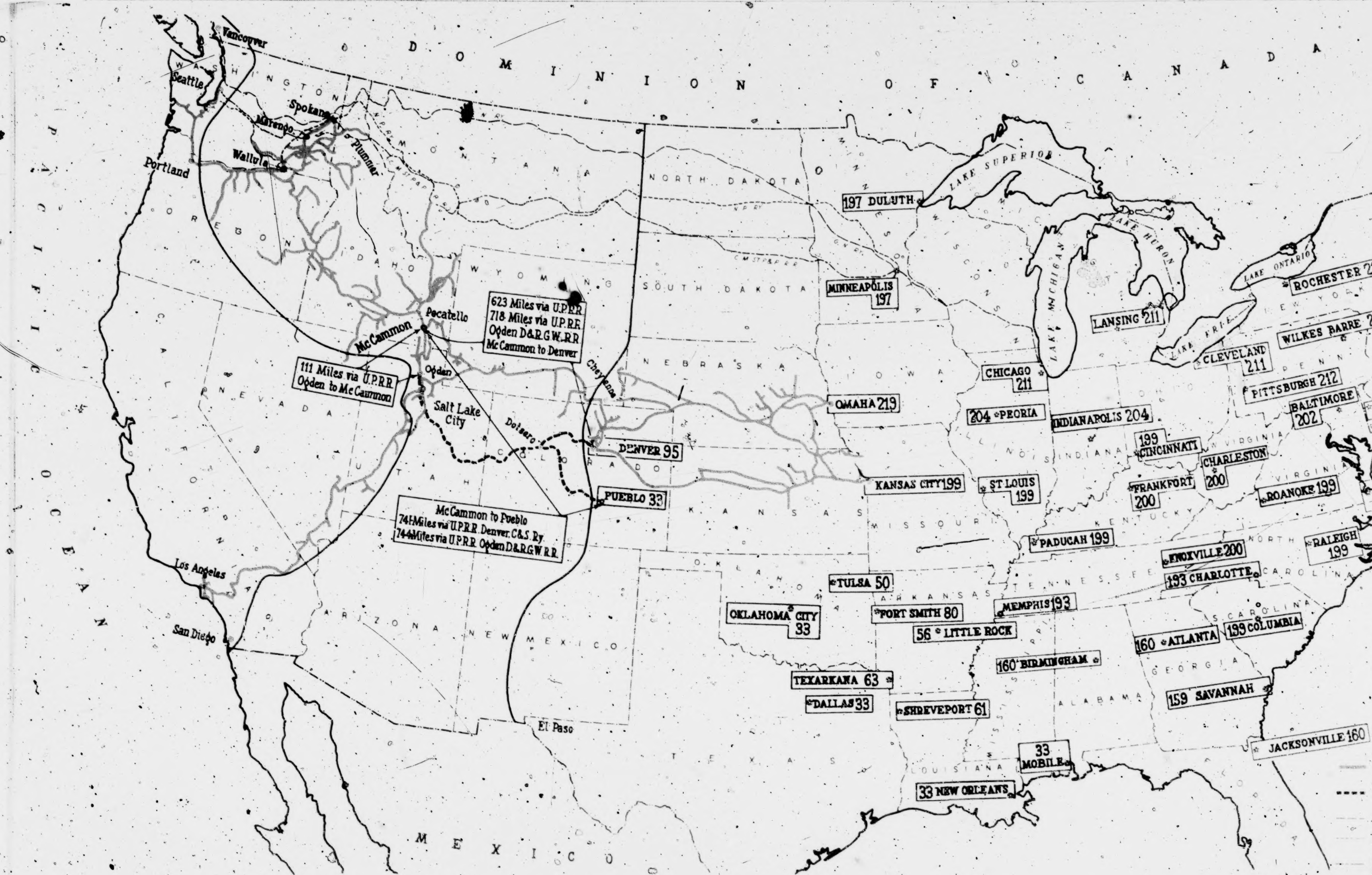
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UNION PACIFIC RAILROAD
DENVER & RIO GRANDE WESTERN RAILROAD
GREAT NORTHERN RAILWAY
NORTHERN PACIFIC RAILWAY
CHICAGO MILWAUKEE ST. PAUL & PACIFIC RAILROAD

APPENDIX B

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in This Case Are as Follows:

National Transportation Policy—

“It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.”

Section 1(3)(a)—

“* * * The term ‘transportation’ as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *

Section 1(4)—

“It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.”

Section 1(5)—

“All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.”

Section 3(1)—

“It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port,

port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in

violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated."

Section 15(4)—

"In establishing any such through route the Commission shall not (except as provided in section

3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest and subject to the foregoing limitations, in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."